Supreme Court, U.S.
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No. 06-137

In The
Supreme Court of the United States

CRAIG MICHAEL HASKELL,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it violates due process and the privilege against self-incrimination for a trial court to use the defendant's continued claim of innocence at sentencing as an indication of a lack of remorse and to impose a greater sentence as a result.

2. Whether it violates due process or the Sixth Amendment rights to trial by jury and proof beyond a reasonable doubt for a judge to increase significantly a defendant's sentence by finding a "continuing pattern of criminal activity" based on events that occurred in one incident over a few minutes.

3. Whether it violates the Sixth Amendment rights to trial by jury and proof beyond a reasonable doubt, as defined by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 961 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), for a trial judge to increase a sentence by finding facts that directly contravene the jury's verdict.

4. Whether it violates the Sixth Amendment for a court to refuse to hold a hearing as to whether there has been ineffective assistance of counsel when the trial lawyer fails to prepare the primary defense, forecloses key areas of impeachment by failing to file timely notice, and through his actions precludes the defendant from being able to have access to potentially crucial evidence.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Statement of Facts	2
Reasons for Granting the Writ	7
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION FOR A COURT TO IMPOSE A GREATER SENTENCE BECAUSE A DEFENDANT EXPRESSES HIS INNOCENCE AT THE SENTENCING PHASE	7
II. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A SPLIT AMONG THE LOWER COURTS AS TO WHETHER DUE PROCESS OR THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY IS VIOLATED IF A "CONTINUING PATTERN OF CRIMINAL ACTIVITY" IS FOUND BASED ON ONE INCIDENT	11

TABLE OF CONTENTS – Continued

Page

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE COURTS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES THE SIXTH AMENDMENT RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT FOR A TRIAL JUDGE TO INCREASE A SENTENCE BY FINDING FACTS THAT DIRECTLY CONTRAVENE THE JURY'S VERDICT 16

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A CONFLICT AMONG THE LOWER COURTS AS TO WHEN THERE MUST BE A HEARING TO DETERMINE IF THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL 21

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 15

Apprendi v. New Jersey, 530 U.S. 466 (2000) 17, 18, 19

Bearden v. Georgia, 461 U.S. 660 (1983) 13

Blakely v. Washington, 542 U.S. 961 (2004) 17, 18, 19

Brecht v. Abrahamson, 507 U.S. 619 (1993) 12

City of Chicago v. Morales, 527 U.S. 41 (1999) 13

Cunningham v. California, No. 05-6551, *certiorari granted*, 126 S.Ct. 1329 (2006) 20

Darden v. Wainwright, 477 U.S. 168 (1986) 13

Doggett v. United States, 505 U.S. 647 (1992) 12

Ewing v. California, 538 U.S. 11 (2003) 11

Geraci v. Senkowski, 211 F.3d 6 (2d Cir. 2000) 10

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) 24

Goldsby v. United States, 152 Fed.Appx. 431 (6th Cir. 2005) 23

Gomez-Diaz v. United States, 433 F.3d 788 (11th Cir. 2005) 23

Isaac v. State, 911 So.2d 813 (Fla. 2005) 14

Lopez v. State, 113 P.3d 713 (Colo. 2005) 19

Mitchell v. United States, 526 U.S. 314 (1999) 7

People v. Black, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (2005) 19

TABLE OF AUTHORITIES – Continued

Page

People v. Felder, 129 P.3d 1072 (Colo.App. 2005) 15

Rompilla v. Beard, 545 U.S. 374 (2005) 21

Schneider v. Delo, 85 F.3d 335 (8th Cir. 1996) 24

Smylie v. State, 823 N.E.2d 679 (Ind. 2005) 19

Sene v. Gonzales, 2006 WL 1836060 (6th Cir. 2006) 24

Soffar v. Dretke, 368 F.3d 441 (5th Cir. 2004) 24

State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (N.C. 2005) 19

State v. Brown, 209 Ariz. 200, 99 P.3d 15 (Ariz. 2004) 19

State v. Dilts, 337 Or. 645, 103 P.3d 95 (Or. 2004) 19

State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) 19

State v. Imlay, 249 Mont. 82 (1991) 10

State v. Maugaotega, 107 Haw. 399, 114 P.3d 905 (2005) 19

State v. Natale, 184 N.J. 458, 18 A.2d 724 (N.J. 2005) 19

State v. Perez, 196 Ore.App. 364, 102P.3d 705 (Ore.App. 2004), *rev'd on other grounds*, 340 Ore. 310, 131 P.3d 168 (Ore. 2006) 14

State v. Rivers, 130 Wash.App. 689, 128 P.3d 608 (Wash.App. 2005) 15

State v. Sauceda, 163 Wis.2d 553 (1991) 14

State v. Shattuck, 689 N.W.2d 785 (Minn. 2004) 19

Sun Savings & Loan Association v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Booker, 543 U.S. 220 (2005) 17, 18, 19

United States v. Davis, 159 Fed.Appx. 814 (9th Cir. 2005) 23

United States v. Ford, 840 F.2d 460 (7th Cir. 1988) 10

United States v. Graham, 2006 WL 1196250 (10th Cir. 2006) 23

United States v. Grande, 353 F.Supp.2d 623 (E.D. Va. 2005) 13

United States v. Laca, 499 F.2d 922 (5th Cir. 1974) 9

United States v. McClain, 2 F.3d 205 (7th Cir. 1993) 10

United States v. Roe, 670 F.2d 956 (11th Cir. 1982) 8

United States v. Walters, 163 Fed.Appx. 164 (10th Cir. 2006) 23

United States v. Wright, 533 F.2d 214 (5th Cir. 1976) 9

Walker v. Gibson, 228 F.3d 1217 (10th Cir. 2000) 24

Wiggins v. Smith, 539 U.S. 510 (2003) 21

Williams v. Stewart, 441 F.3d 1030 (9th Cir. 2006) 10

Wilson v. Florida, 776 So.2d 347 (Fla. 2001) 13

STATUTES

MCL 750.520j(2) 23

MCL 777.1 ..... 16, 20

MCL 777.32 17

MCL 777.43 11

OPINIONS BELOW

A copy of the unpublished opinion of the Court of Appeals of the State of Michigan is included in the Appendix to this Petition for Certiorari at page 1 (hereafter "App.") A copy of the unpublished order of the Supreme Court of Michigan denying review, dated April 26, 2006, is included at App. 17. A copy of the unpublished opinion of the Circuit Court for the County of Livingston, State of Michigan, is at App. 18.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §1257, this Court has jurisdiction to review the decision of the Michigan Court of Appeals, following the denial of discretionary review by the Supreme Court of California on April 26, 2006.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . . "

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Craig Haskell was convicted in Livingston County Circuit Court, State of Michigan, of four counts of Criminal Sexual Conduct in the First Degree, one count Criminal Sexual Conduct in the Second Degree, and one count of Domestic Violence. The jury acquitted Haskell of Felonious Assault.

On October 2, 2003, the Livingston County Circuit Court sentenced Haskell to 12 to 30 years in prison for Criminal Sexual Conduct in the First Degree, and 10 to 15 years imprisonment for Criminal Sexual Conduct in the Second Degree. He was sentenced to one year in the county jail for the domestic violence conviction. App. at 46-47.

Haskell filed a timely notice of appeal as of right on October 31, 2003. On June 23, 2005, the Michigan Court of Appeals issued an unpublished opinion affirming Haskell's convictions and sentences. *See* App. at 1.

Haskell then filed a timely Application for Leave to Appeal to the Michigan Supreme Court. On April 26, 2006, the Michigan Supreme Court, without opinion, denied review. App. at 17.

STATEMENT OF FACTS

This case arose from the events of May 17, 2002, when Craig Haskell, then 21 years old, visited his former girl friend Rae Russell. Russell, then age 19, was a college student whose non-campus residence was her parents' home. Haskell and Russell had dated for two and a half years, had broken up, and at the time of the incident had

just begun to see each other again. Russell testified that four days earlier, she and Haskell had oral sex in her bedroom. (Tr. I, 219).*

On the evening of the incident, the two watched a movie together in the basement of the home while Russell's parents watched television upstairs. Afterward, as was their custom when they were dating, Russell changed into her pajamas so that, as she put it in her testimony, Haskell could "tuck [her] in." (Tr. I, 194).

Russell said that Haskell suddenly began crying, that his behavior changed dramatically, and that he acted in a way that she had not seen before. (Tr., I, 225-26, 239-40, 242; Tr. II, 49). At this point, Russell claims that Haskell physically and sexually assaulted her, including holding scissors to her throat. (Tr. I, 196-202). Then Haskell suddenly stopped and snapped out of it. (Tr. I, 245; II, 51). He repeatedly said, "What have I done?" (Tr. I, 245; II, 51). He was shaking and apologized. (Tr. I, 247). Russell told him to go home and get help from his parents. (Tr. I, 203-04, 239, 246). Russell acknowledged at trial that over their two and a half year relationship, Haskell had never threatened her, assaulted her, hit her, or threatened her family. (Tr. I, 224).

Haskell returned home on the night of May 18, 2002, shortly after midnight, and burst into his parents' room. (Tr. II, 209). He was frantic and crying uncontrollably. (Tr. II, 210). Haskell's mother took him to the psychiatric emergency room at the University of Michigan Hospital. He was admitted to the psychiatric unit for ten days. (Tr.

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* Citations (Tr.) are to the trial transcript, volume and page number.

II, 211-12). When he was discharged, the tentative diagnosis was psychosis NOS (not otherwise specified). (Tr. III, 90).

The expert witnesses at trial confirmed that Haskell suffered from a psychiatric condition. The defense witness, Dr. Kenneth Pitts, the psychiatrist who treated Haskell, testified that testing revealed that Haskell had Complex Partial Seizure (CPS).** He said that he believed that Haskell did not appreciate the wrongfulness of his conduct and could not conform his conduct to the requirements of the law when he was having the complex partial seizure. (Tr. III, 209).

The prosecutor called Dr. Lisa Marquis, a psychologist, as an expert witness. She agreed with Dr. Pitts that Haskell was suffering from a mental illness. (Tr. III, 172). She said that she could not rule out that Haskell suffered from Complex Partial Seizure. (Tr. III, 201). But she disagreed with Dr. Pitts on the issue of whether Haskell appreciated the wrongfulness of his conduct and whether

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** Complex Partial Seizure involves just the temporal lobe of the brain and differs from ordinary epilepsy because ordinary epilepsy involves the motor part of the brain and results in grand mal seizures. (Tr. III, 45). Complex partial seizure is often confused with schizophrenia because the left temporal lobe plays a major role in both disorders. (Tr. III, 46, 106). Complex partial seizure produces neuropsychiatric symptoms, including rapid heart beat, feeling unreal, hallucinations (visual, auditory, and olfactory), and psychotic phenomena both during and after the seizures. (Tr. III, 47). While having a seizure, a person can engage in a wide range of behaviors in a state of being unaware – absence of clear consciousness. (Tr. III, 106-07). Aggressive acting out is common with complex partial seizure and often the person has no memory and no awareness of what they did during the episode. (Tr. III, 106-07). The person has no appreciation of reality during the seizure and no appreciation of his behavior and surroundings. (Tr. III, 107).

he was able to conform his behavior to the requirements of the law. (Tr. III, 176-77). Dr. Marquis admitted that her only knowledge of Complex Partial Seizure came from two lectures totaling approximately an hour, which she attended during her internship. (Tr III, 166-67).

There is no dispute that Haskell hit Russell that night. Russell's defense to that charge was his psychiatric condition. Both the prosecutor's and the defense's experts at trial agreed that Haskell suffers from an uncommon form of petit mal epilepsy called Complex Partial Seizure (CPS), also known as temporal lobe epilepsy. Haskell contends that he was suffering such a seizure when he struck Russell in the face.

There is, however, great dispute over whether Haskell raped Russell. Haskell has maintained from the outset that no sexual assault, or sexual contact of any kind, occurred that night. There was no physical evidence of rape, such as the presence of semen. The victim did not mention a rape to the police when she first reported the assault. At the hospital, when asked, the victim said that there was no sexual assault. (Tr. II, 16-17, 21, 47).

There also was dispute over whether Haskell used the scissors against Russell. The jury acquitted Haskell of this, declaring him not guilty of the charge of Felonious Assault, which would have required the finding of use of a dangerous weapon. No scissors were ever found and neither the victim's mother or the officer who photographed the room ever saw any scissors. (Tr. II, 73-74, 83, 164-65, 170).

The jury found the defendant "guilty but mentally ill" and convicted Haskell of four counts of Criminal Sexual Conduct in the First Degree, one count Criminal Sexual

Conduct in the Second Degree, and one count of Domestic Violence. The four counts were because Russell testified that Haskell put his fingers in her vagina twice before intercourse and once afterwards. (Tr. I, 201; App. at 40).

At sentencing, the judge pointed to several factors as warranting an increase in the sentence above the statutory minimum prescribed by Michigan law for the offenses.

At the sentencing hearing, Haskell expressed his innocence to the rape charge. App. at 39. The judge repeatedly said that this showed a lack of remorse and imposed a greater sentence as a result. App. at 43-45.

The trial judge also found three enhancements under the Michigan sentencing guideline system. First, the judge increased the sentence by finding that the defendant used a potentially lethal weapon, the scissors, even though the jury had found that the defendant did not do so in acquitting him for Felonious Assault. The judge dismissively stated that the jury's verdict was just "an opinion." App. at 26.

Second, the judge substantially increased the defendant's sentence by finding that there was a continuing pattern of criminal activity, App. at 28-29, even though *all* of the criminal events occurred in this one incident on this single evening. App. at 40.

Finally, the judge found exploitation of a vulnerable victim and enhanced the sentence. App. at 27-28. This was based on the defendant gaining access to and sexually assaulting the victim as a consequence of their former romantic relationship.

The Michigan Court of Appeals rejected all of Haskell's objections to his conviction and sentence. App. at 1-16. The Michigan Supreme Court denied review. App. at 17.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION FOR A COURT TO IMPOSE A GREATER SENTENCE BECAUSE A DEFENDANT EXPRESSES HIS INNOCENCE AT THE SENTENCING PHASE.

In *Mitchell v. United States*, 526 U.S. 314 (1999), this Court held that the Fifth Amendment privilege against self-incrimination applies at the sentencing phase. An important issue, never confronted by this Court, has split the Circuits and the state courts: Does it violate due process and the privilege against self-incrimination for a trial court to interpret a defendant's expression of innocence at the sentencing phase as a lack of remorse and thereby impose a greater sentence?

That is exactly what occurred in this case. At the sentencing proceeding, Craig Haskell repeated his claim that he was innocent of rape. He said, in part: "I've stood in this Court many times over the past year always as an innocent man. . . . I know that one day the truth will come out and I stand before you still an innocent man." App. at 39.

The trial court responded to this by saying that it showed a lack of remorse and that it justified imposing a greater sentence on Haskell. The trial court declared, immediately after Haskell's statement: "I don't see any remorse in this case. None. And it's bothersome to me. I took the bench today not knowing what I was going to do to you, and frankly, the statement you made does not impress me. . . . And frankly, I'm having trouble with what I wanna do with you. . . . The only question I have is how much above the minimum I should go?" App. at 43. The judge then repeated: "I don't see a thread or thimble of remorse or of reaching out to the victim in this case and saying I'm sorry for what you have been put through." App. at 44. The judge then repeated: "His statement just a few seconds ago did not convey remorse to me." App. at 45.

There is thus no doubt that the judge's choice to increase the sentence above the statutory minimum was based on his conclusion that there was a lack of remorse and this was because Haskell expressed his innocence during the sentencing proceeding. The Michigan Court of Appeals expressly upheld this and declared: "[T]he trial court appropriately considered defendant's lack of remorse in determining his ability to be reformed." App. at 15.

There is a flat out split among the courts in this country as to whether it is unconstitutional for a trial court to use a claim of innocence during the sentencing phase as evidence of a lack of remorse and thus as a basis for imposing a greater sentence. Many courts have held that it is unconstitutional for a court to use a defendant's continued expression of innocence as a basis for a higher sentence. For example, in *United States v. Roe*, 670 F.2d 956, 973 (11th Cir. 1982), the court explained that a "[s]entencing court may not present the defendant with a

choice between admitting his guilt and enduring a harsher sentence for failing to do so."

Likewise, the Fifth Circuit has consistently ruled that a greater sentence cannot be imposed on a defendant for refusing to admit to his or her guilt. In *United States v. Wright*, 533 F.2d 214 (5th Cir. 1976), the court of appeals overruled a sentence that had been increased because a defendant continued to express his innocence and refused to admit to guilt. The Court of Appeals held that trial court effectively penalized the defendant for exercising his constitutionally guaranteed rights by urging him to "come clean" prior to imposing the sentence and then imposing a greater sentence when he failed to do so. The court said that the fact that maximum statutory term was not imposed was not dispositive. The court explained: "Appellants . . . base their appeal entirely on various comments made by the trial court at the beginning of their trial and immediately prior to sentencing." *Id.* at 215-16. The court said: "In *Thomas v. United States*, this court established the rule that a trial court may not pressure defendants, who have been found guilty following a trial by jury, to confess their guilt prior to the imposition of sentence." *Id.* at 217 (citation omitted). The court thus reversed the sentence because it had been increased by virtue of the defendant refusing to admit to his guilt at the sentencing phase.

Likewise, in *United States v. Laca*, 499 F.2d 922, 927-28 (5th Cir. 1974), the Court held that a defendant's Fifth Amendment privilege against self-incrimination is violated where a sentencing court takes into consideration a defendant's refusal to confess after a not guilty plea.

Other courts, too, have taken an approach directly opposite to what the Michigan courts did here. The Second Circuit, for instance, declared that "insistence upon innocence is not the same as absence of remorse." *Geraci v. Senkowski*, 211 F.3d 6, 10 (2d Cir. 2000). In *State v. Imlay*, 249 Mont. 82 (1991), the court found it unconstitutional to impose a greater sentence because a defendant expressed his innocence.

But other courts, like the Michigan Court of Appeals here, have come to the opposite conclusion. The Ninth Circuit, for example, recently held that it is permissible for a court to increase a sentence based on an assertion of innocence. In *Williams v. Stewart*, 441 F.3d 1030, 1052-53 (9th Cir. 2006), the court explained: "Williams also argues that the trial court held his assertion of innocence against him when the trial court found that there was no possibility of rehabilitation. . . . But even if the trial court did consider Williams's assertion of innocence when it found that Williams could not be rehabilitated, this was not error. . . . We hold that the state trial court in sentencing; did not offend the Fifth Amendment; by penalizing Williams for asserting his innocence."

In many cases, the Seventh Circuit has found that sentences can be increased for the failure to show remorse as demonstrated by a continued expression of innocence. *United States v. McClain*, 2 F.3d 205, 207 (7th Cir. 1993); *United States v. Ford*, 840 F.2d 460, 466-67 (7th Cir. 1988).

This is an issue that arises in criminal courts every day. If a defendant refuses to admit guilt at sentencing, may this be taken as evidence of a lack of remorse and be a basis for a greater sentence? This Court should grant

much needed review and clarify the law in this area and resolve a split among the lower courts.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A SPLIT AMONG THE LOWER COURTS AS TO WHETHER DUE PROCESS OR THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY IS VIOLATED IF A "CONTINUING PATTERN OF CRIMINAL ACTIVITY" IS FOUND BASED ON ONE INCIDENT.

Sentencing systems across the country understandably provide for harsher punishments for those who are engaged in repeated criminal activity. *See, e.g., Ewing v. California*, 538 U.S. 11, 15 (2003) (describing "three strikes laws" that provide for incarceration of repeat felons). One form such laws take is for sentencing statutes to provide, as does Michigan law, for significant sentencing enhancements for those involved in a continuing pattern of criminal behavior. MCL 777.43. The issues thus often arise, but have never been examined by this Court, as to what is sufficient to constitute a "continuing pattern of criminal activity" under the due process clause and what role the jury must play in making this determination under the requirements of the Sixth Amendment.

The trial judge here found that the events towards the victim in this case on a single night, over the period of a few minutes, constituted a "continuing pattern of criminal behavior." Based on this, the judge imposed a very significant increase in the sentence, 25 points under the Michigan sentencing law. App. at 28-29. Haskell never before had been accused of any crime and the victim testified at

trial that he had never before assaulted or threatened her. (Tr. I, 224).

The continuing pattern of criminal activity was that during the alleged rape he inserted his finger into her vagina several times and had intercourse with her, each penetration being deemed a separate crime. App. at 40. The Court of Appeals said that this was sufficient to constitute a continuing pattern of criminal activity, even though the acts occurred during the commission of a single rape. The Court of Appeals stated: "Each forcible penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and case law. Therefore, the trial court did not abuse its discretion in counting each offense as part of the defendant's pattern of criminal behavior." App. at 16.

Under this theory, almost any crime could, by itself, be deemed a continuing pattern of criminal activity. A person in a fight who landed four punches could be charged with four counts of battery and then that would be the basis for finding a continuing pattern of criminal activity and thus grounds for a tremendous increase in the sentence. A person who fired a gun multiple times would be engaged in a pattern of criminal activity.

This, however, is so arbitrary and unfair as to raise significant questions under the due process clause and to warrant review by this Court. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993) (Stevens, J., concurring) ("[t]he Fourteenth Amendment prohibits the deprivation of liberty 'without due process of law'; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings."); *Doggett v. United States,* 505 U.S. 647, 666

(1992) (Thomas, J., dissenting) ("the Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings"); *Darden v. Wainwright*, 477 U.S. 168 (1986) (fundamentally unfair procedures violate due process); *Bearden v. Georgia*, 461 U.S. 660, 666 (1983) (due process is violated by procedures that are "fundamentally unfair or arbitrary.") Indeed, if "continuing pattern of criminal activity" is so broad as to include, as here, events that occurred in minutes, then it offends due process as being so vague as to not provide defendants adequate notice of what might be punished. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (vague laws that fail to provide adequate notice are unfair and "authorize and even encourage arbitrary and discriminatory enforcement.")

Not surprisingly, courts are divided as to what can constitute a "continuing pattern of criminal activity." Here, the Michigan courts found a continuing pattern from several acts that occurred to one victim in a few minutes. In sharp contrast, a federal district court recently found that events that occurred three days apart could not be a "pattern of criminal behavior." *United States v. Grande*, 353 F.Supp.2d 623, 633 (E.D. Va. 2005); *see also Wilson v. Florida*, 776 So.2d 347 (Fla. 2001) (a rapid succession of hits from a baseball bat was one assault and could not be charged as multiple assaults). *But see Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) (in order to establish required "pattern" it is not necessary to show more than one fraudulent scheme or criminal episode). This Court should grant review to

determine whether allowing a pattern of criminal behavior to be based on one incident violates due process.***

Independently of the due process issue, there is a crucial question of whether the Sixth Amendment rights to trial by jury and proof beyond a reasonable doubt are violated when the judge, rather than the jury, determines that there is a pattern of criminal activity. In this case, there was no instruction to the jury asking them to find a pattern of criminal activity. Rather, the judge, on his own, found this and tremendously increased the sentence as a result. As a factor which increased the sentence beyond what could be based on the jury's verdict, this raises an important issue under *Blakely v. Washington,* 542 U.S. 961 (2004).

In fact, there is a conflict among the lower courts on this issue. For example, in *Isaac v. State*, 911 So.2d 813, 814 (Fla. 2005), the appellate court accepted the defendant's argument that "an escalating pattern of criminal activity, is a factual determination that must be found beyond a reasonable doubt by a jury, and that the trial court violated his sixth amendment right to a trial by jury as explained in *Apprendi v. New Jersey*, and clarified by *Blakely v. Washington*." *See also State v. Perez*, 196 Ore.App. 364, 372-73, 102 P.3d 705 (Ore.App. 2004), *rev'd on other grounds,* 340 Ore. 310, 131 P.3d 168 (Ore. 2006) (a

*** This also can be phrased as a matter of double jeopardy. The Double Jeopardy Clause prohibits multiple punishments for the same offense. By calling one assault a "pattern of criminal activity," the court was essentially dividing one crime into multiple offenses and imposing multiple punishments for the same offense. *See, e.g., State v. Sauceda*, 163 Wis.2d 553 (1991) (defendant's conviction for both first-degree and second-degree sexual assault was a multiple punishment for a single act in violation of constitutional prohibitions against double jeopardy).

finding of "persistent involvement" in criminal activity is for the jury).

But other courts have come to the opposite conclusion and have held that the jury does not need to make the fact finding necessary to increase the sentence for a pattern of criminal activity. *See, e.g., State v. Rivers,* 130 Wash.App. 689, 128 P.3d 608 (Wash.App. 2005) (jury need not make findings for application of Persistent Offender Accountability Act); *People v. Felder*, 129 P.3d 1072 (Colo.App. 2005) (defendant was not entitled to a jury trial on the issue of whether defendant was a habitual criminal pursuant to the habitual criminal statute.)

This issue is distinct from that decided in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that prior convictions do not need to be proven to a jury. This case involves no prior convictions. Rather, the issue is whether a judge can impose a significant increase in a sentence by finding a "continuing pattern of criminal activity" or whether under *Blakely* this must be found by the jury since it significantly increases the sentence beyond what could be based on the jury's verdict. This is an issue of great national importance which will continue to confound the lower courts until there is guidance and clarification from this Court.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE COURTS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES THE SIXTH AMENDMENT RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT FOR A TRIAL JUDGE TO INCREASE A SENTENCE BY FINDING FACTS THAT DIRECTLY CONTRAVENE THE JURY'S VERDICT.

Michigan now has a sentencing system that is based on legislatively prescribed guidelines. MCL 777.1 *et seq.* The legislature sets the minimum sentence for offenses and the judge is to increase the sentence if specific enhancements are found. This case poses the important issue of whether a judge may find an enhancement based on facts expressly rejected by the jury.

In this case, the trial judge increased the sentence by disagreeing with the jury's verdict and finding a fact that the jury rejected. Haskell was charged with Felonious Assault based on the prosecutor's claim that he put scissors to the victim's throat at the time of the crime. This charge would have required that the jury find that a weapon was used. The jury found Haskell not guilty of this offense. (Tr. V, 19.)

There was good reason for the jury to conclude that no scissors were used. The victim did not mention the scissors until her second police statement. (Tr. I, 233, 235; II, 21, 34, 36, 37, 71-72). No scissors were ever found and neither the victim's mother or the officer who photographed the room ever saw any scissors. (Tr. II, 73-74, 83, 164-65, 170). The victim told a variety of different stories about why no scissors were ever found: she threw them away (Tr. I, 234); her mom wiped the scissors when she cleaned the room

(Tr. II, 37); she pointed the scissors out to Officer Ickes, but he did not take them. (Tr. II, 40).

Despite the jury's conclusion that there were no scissors as reflected in its acquittal on the Felonious Assault charge, the trial judge made a factual finding that scissors were used and enhanced the sentence as a result of this. App. at 26. One enhancement, called OV 2, is for use of a potentially lethal weapon. The judge found this to be present in that he concluded that the scissors were present. App. at 26.

When the defense lawyer pressed the point that the jury had rejected this conclusion, the judge dismissively stated that the jury's "verdict was an opinion." 26. The judge then increased the defendant's sentence by assessing 5 points under OV 2 on the grounds that "the offender possessed" a "cutting or stabbing weapon." MCL 777.32. Thus, the sentence was increased because the judge found a fact that directly contravened the jury's verdict.

This case thus directly poses the question of whether a judge, consistent with this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 961 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), can increase a defendant's sentence by finding facts expressly rejected by the jury. The Michigan Court of Appeals decided this question in a footnote by declaring that *Apprendi* and *Blakely* do not apply to that state's sentencing system. The Court of Appeals declared: "Defendant argues that pursuant to *Blakely v. Washington*, the trial court erred in considering facts not found by the jury in scoring OV 2 and OV 10. However, *Blakely* does not apply to Michigan's sentencing guideline system." App. at 15 (citations omitted).

This cannot be reconciled with this Court's decision in *United States v. Booker*, which expressly held that *Apprendi* and *Blakely* do apply to sentencing guideline systems. Michigan now has such a system. Tellingly, the Michigan Court of Appeals never mentioned the *Booker* decision, even though it was issued six months before the Court of Appeals ruling on June 23, 2005. App. at 15 n.1.

Indeed, there also is a clear conflict between this Court's decisions in *Apprendi* and *Blakely* and the Michigan Court of Appeal's decision. *Apprendi* held that a fact is deemed an element of the offense and must be proven to a jury beyond a reasonable doubt if it exposes the defendant to greater punishment than that available in the absence of such proof. *Apprendi v. New Jersey*, 530 U.S. at 490. *Blakely v. Washington* further elaborated on the right to a jury determination of non-recidivist aggravating factors beyond a reasonable doubt. There, this Court held Washington's sentencing procedure violated the Sixth Amendment because it permitted the trial court to impose a sentence above the "standard range" or statutory maximum if it found the existence of an aggravating factor demonstrating substantial and compelling reasons for an exceptional sentence. As the Court explained: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts." 542 U.S. at 303-04 (emphasis in original).

Yet, here the trial court imposed a greater sentence than that which could be based on the jury's verdict by

finding facts contrary to the jury's conclusion. This is inconsistent with *Apprendi*, *Blakely*, and *Booker*.

Moreover, there is a conflict among the lower courts as to whether, in a sentencing system like Michigan's, the judge may find facts expressly rejected by the jury and then increase a defendant's sentence based on these facts. Decisions from Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon have applied a bright-line rule, holding that the Sixth and Fourteenth Amendments are necessarily violated when a sentencing judge finds facts in imposing a sentence longer than the maximum authorized by the jury's verdicts or the defendant's admissions. *See, e.g. State v. Brown,* 209 Ariz. 200, 203, 99 P.3d 15, 18 (Ariz. 2004); *Lopez v. State,* 113 P.3d 713, 723-725 (Colo. 2005); *Smylie v. State,* 823 N.E.2d 679, 863 (Ind. 2005); *State v. Shattuck,* 689 N.W.2d 785, 786 (Minn. 2004); *State v. Natale,* 184 N.J. 458, 466, 878 18 A.2d 724, 728 (N.J. 2005); *State v. Allen,* 359 N.C. 425, 615 S.E.2d 256, 264-265 (N.C. 2005); *State v. Dilts,* 337 Or. 645, 649, 103 P.3d 95, 99 (Or. 2004).

On the other hand, state courts in California, Hawaii, and Tennessee, finding no bright-line rule, have concluded that such fact-finding by judges is constitutional when conducted within a sentencing scheme characterized by broad judicial discretion. *See, e.g., People v. Black,* 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (2005); *State v. Maugaotega,* 107 Haw. 399, 114 P.3d 905, 914-915 (2005); *State v. Gomez,* 163 S.W.3d 632, 661 (Tenn. 2005). This sharp split of authority cannot be resolved without this Court's intervention and certiorari is thus appropriate.

This Court has granted certiorari on the issue of "whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments." *Cunningham v. California*, No. 05-6551, *certiorari granted*, 126 S.Ct. 1329 (2006). Although the issue presented here is similar to that in *Cunningham*, there are sufficient differences to warrant certiorari in this case as well. First, *Cunningham* did not involve a situation, like this case, where the judge based an increase in sentence on a fact expressly rejected by the jury. *Cunningham* involves whether the judge may find aggravating factors without a jury determination; this case poses the question of whether a judge may find an enhancement that is inconsistent with a jury's verdict. Second, there are significant differences between the Michigan and California sentencing systems. California relies on a determinate sentencing system, while in Michigan it is a guideline system; the legislature has set the minimum sentence which the defendant must serve and then the sentence is increased based on facts prescribed by the legislature. MCL 777.1 *et seq.*

Thus, this case poses issues distinct from *Cunningham* and warrants a separate grant of certiorari.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A CONFLICT AMONG THE LOWER COURTS AS TO WHEN THERE MUST BE A HEARING TO DETERMINE IF THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL.

In recent years, this Court has clarified the standard for ineffective assistance of counsel. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). These cases, however, raise an important issue which is creating significant confusion in the lower courts: when must there be a hearing to determine whether there are sufficient facts to establish ineffective assistance of counsel?

This case presents an ideal vehicle for addressing this issue. In this case, there was very significant evidence of ineffective assistance of counsel. Haskell was represented by Ron Plunkett from June 2002 until May 19, 2003. When Haskell met with Plunkett on the evening before the trial, it was apparent that Plunkett had not prepared for the trial and had not prepared the insanity defense. As explained above, Haskell's primary defense was that he suffered from Complex Partial Seizure disorder and because of that he was legally insane at the time of the events that formed the charges. Despite the fact that Plunkett had Haskell's medical records and knew about Haskell's treating physician, Dr. Pitts, since June 2002, Plunkett did not talk to Pitts until the eve of the trial. If Plunkett had prepared for trial, he would have known that further testing of Haskell was required to establish the psychiatric disorder and provide valuable evidence to the jury.

Plunkett's misconduct went even further. After Haskell discharged Plunkett as his lawyer, Plunkett went to the judge and accused Haskell of making a threat. Unfortunately, the contents of the in-chambers discussion were not placed on the record. There is evidence to suggest that Plunkett lied to the judge about threats from Haskell.**** These statements from Plunkett to the court caused the trial court to revoke bail, send Haskell to the county jail, and refuse all attempts to get Haskell released so that he could be tested.

Dr. Pitts believed that it was essential to have a PET scan performed to confirm the diagnosis of Complex Partial Seizure. The test, however, could not be performed because Haskell was confined to the county jail. Also, Dr. Pitts wanted to have Haskell examined by an independent forensic psychiatrist. This, too, was frustrated by Haskell's confinement. The jail refused to allow Haskell to be released to have the test performed.

The ineffective assistance of counsel meant that the jury was never instructed on Haskell's actual defense, Complex Partial Seizure disorder. Instead, the instruction was only about the insanity defense, where Haskell had the burden of proof.

**** In the petition for review to the Michigan Supreme Court, Haskell pointed to comments by the prosecutor, Plunkett's comments to Haskell's subsequent attorney, and Plunkett's response to a state bar grievance to indicate that Plunkett had lied to the court. Appendix L to Application for Leave to Appeal. Haskell requested that the Michigan Court of Appeals remand the case for a factual hearing on the issue of ineffective assistance of counsel. The Court of Appeals, without opinion, denied that request.

Plunkett's ineffective assistance of counsel also precluded defendant from raising key impeachment evidence at trial. Under Michigan law, a defendant who wishes to raise prior sexual acts of the victim must file a timely notice under MCL 750.520j(2). No such notice ever was filed by Plunkett, even though he knew that Russell and Haskell had been in a romantic relationship and the topic came up at the preliminary examination. (Tr. I, 12). This meant that Russell could not be questioned about this at trial. Nor, as the Court of Appeals noted, could Russell be questioned about her desire to keep her parents from knowing about her sexual activity. App. at 12-13. This was crucial to Haskell's explanation for why Russell falsely accused him of sexual assault.

Haskell asked the Court of Appeals to order a hearing on ineffective assistance of counsel. But it denied this request without opinion. The Court of Appeals then proceeded to reject the claim of ineffective assistance of counsel by adopting a set of facts totally at odds with what Haskell says occurred. App. at 9-14.

The question, then, is whether due process and the Sixth Amendment right to effective assistance of counsel required that there be an opportunity for a factual hearing to determine whether there was ineffective assistance of counsel. The lower court decisions are very inconsistent and fail to articulate any consistent approach as to when an evidentiary hearing is warranted. *Compare, e.g., United States v. Graham*, 2006 WL 1196250 (10th Cir. 2006); *Gomez-Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005); *United States v. Davis*, 159 Fed.Appx. 814 (9th Cir. 2005) (requiring an evidentiary hearing on ineffective assistance of counsel), *with United States v. Walters*, 163 Fed.Appx. 164 (10th Cir. 2006); *Goldsby v. United States*,

152 Fed.Appx. 431 (6th Cir. 2005) (no evidentiary hearing warranted on whether there was ineffective assistance of counsel).

This division of authority is particularly important given that lower courts are divided as to whether and when the failure to preserve and present an insanity defense is ineffective assistance of counsel. For example, in *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), the Sixth Circuit found that there was ineffective assistance of counsel in the defense lawyer not securing expert testimony that the petitioner's brain function was organically impaired. The court noted that if the lawyers had done what they should have, significant evidence of neurological impairment could have been produced. *Id.* at 1208. More recently, the Sixth Circuit similarly found that "former counsel was potentially ineffective for failing to present corroborating medical evidence." *Sene v. Gonzales*, 2006 WL 1836060 (6th Cir. 2006). State courts, too, have found ineffective assistance of counsel in situations like this one. *See, e.g., Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) ("Counsels' unreasonable failure to present such medical evidence constituted ineffective assistance.")

But other courts have treated the failure to pursue an insanity defense as a strategic choice of the lawyer and have refused to find ineffective assistance of counsel. *See, e.g., Walker v. Gibson*, 228 F.3d 1217 (10th Cir. 2000); *Schneider v. Delo*, 85 F.3d 335 (8th Cir. 1996).

This Court should grant review to clarify an issue of great national importance: when is a factual hearing on the issue of ineffective assistance of counsel required by the Constitution's guarantees of due process and effective assistance of counsel?

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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2005 WL 1489480 (Mich.App.)

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Craig Michael HASKELL, Defendant-Appellant.

No. 251929.

June 23, 2005.

Before: OWENS, P.J., and CAVANAGH and NEFF, JJ.

[UNPUBLISHED]

PER CURIAM.

Defendant appeals as of right his jury convictions of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), one count of second-degree CSC, MCL 750.520c(1)(f), and aggravated domestic violence, MCL 750.81a(2), for beating and sexually assaulting his former girlfriend after she refused to rekindle their relationship. We affirm.

On appeal, defendant argues that the trial court erred several times concerning the admission of evidence. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v. Katt*, 468 Mich. 272, 278; 662 NW2d 12 (2003).

Defendant first claims that the trial court abused its discretion by excluding as hearsay defendant's statement to his mother about hearing voices immediately after returning from the victim's home on the night of the incident because that statement constituted an excited utterance. We disagree.

MRE 803(2) allows admission of a statement otherwise excluded as hearsay when the statement is an excited utterance, which is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Defendant argues that, pursuant to *People v. Smith,* 456 Mich. 543, 550; 581 NW2d 654 (1998), citing *People v. Straight,* 430 Mich. 418, 424-425; 424 NW2d 257 (1988), the statement need no longer relate to the startling occasion to be admissible. This argument is wholly without merit. See MRE 803(2); *Smith, supra.*

The startling event in this case was defendant suddenly seeing the victim bruised and bloody; therefore, we agree with the trial court's determination that defendant's subsequent statement, "I hit her," resulted from this event. However, it does not follow that defendant's statement, "make the voice stop," was a result of seeing the victim bruised and bloody, but, rather, a result of hearing voices. Therefore, the trial court did not abuse its discretion in excluding the statement.

Defendant's remaining evidentiary issues are unpreserved. When an unpreserved issue is reviewed for plain error affecting substantial rights, reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v. Carines,* 460 Mich. 750, 763; 597 NW2d 130 (1999).

Defendant asserts that the trial court plainly erred in admitting false testimony from the prosecutor's expert witness. We disagree that the testimony was false or that the trial court erred in admitting it. Defendant essentially

argues that the prosecutor's expert's testimony concerning the effect of a complex partial seizure was incorrect as a matter of medical fact. However, defendant misconstrues the prosecutor's expert's testimony. The expert did not testify that someone experiencing a complex partial seizure would still be in control and cognizant. In fact, during cross-examination she admitted that someone experiencing a seizure may not appreciate the wrongfulness of their behavior, may not be able to conform their actions to the law, and may not remember what happened during a seizure. Instead, the prosecutor's expert testified that, after reviewing the information concerning defendant's actions before, after, and *during* the assault, she found nothing to suggest that *defendant* was not cognizant of what was happening or was unable to control his actions. This testimony supports a finding that, even if defendant suffers from the disorder, she found nothing to suggest that defendant was suffering from an actual seizure at the time of the assault. The trial court did not err.

Defendant next asserts that the trial court plainly erred in admitting the prosecutor's expert's testimony stating her opinion concerning defendant's mental cognizance and capacity for control at the time of the assault. We disagree. MRE 704 provides, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Michigan case law specifically states that an expert testifying in a criminal case can give an opinion as to whether a defendant is able to conform his conduct to the requirements of the law and whether he is mentally ill or insane. *People v. Caulley,* 197 Mich.App 177, 193; 494 NW2d 853 (1992). Therefore, defendant has

failed to show plain error through the admission of such opinion testimony.

Defendant next asserts that the trial court plainly erred in admitting the prosecutor's expert's testimony in which she read portions of the victim's hearsay statements to police. We disagree. Under the version of MRE 703 in effect at the time of defendant's trial, an expert witness may base his or her opinion on hearsay evidence. *Caulley, supra* at 194-195. Furthermore, this evidence was admissible at the discretion of the trial court and we decline to disturb a trial court's admission of such evidence through MRE 703 absent an objection based upon unfair prejudice, MRE 403. See *id.* at 195. Therefore, under the version of MRE 703 in effect during defendant's trial, the trial court had discretion to allow the prosecutor's expert to include in her testimony those portions of the victim's statements to police which she relied on in forming her expert opinion. Furthermore, the admission of this testimony did not violate defendant's right to confront his accuser where the victim was available to testify. See *Crawford v. Washington,* 541 U.S. 36, 59 n 9; 124 S Ct 1354; 158 L.Ed.2d 177 (2004).

Next, defendant asserts that the trial court plainly erred in replaying the taped testimony of the prosecutor's expert when requested by the jury without also replaying the testimony of defendant's expert. We disagree. Defendant did not object to the replay of the testimony of the prosecutor's expert and, in fact, indicated his approval of the trial court's handling of the request both before and after the replay; therefore, defendant has waived this issue on appeal. See *People v. Carter,* 462 Mich. 206, 214-216; 612 NW2d 144 (2000). Because defendant waived this right, there is no error to review. See *id.* at 219. Regardless,

MCR 6.414(H) indicates that the trial court is not to refuse a reasonable request of the jury and Michigan law does not require that portions of testimony other than what is requested be read or replayed as well. See *People v. Howe*, 392 Mich. 670, 675-676; 221 NW2d 350 (1974).

Next, defendant argues that the trial court abused its discretion in refusing to sequester the prosecutor's expert to prevent her from listening to defendant's expert's testimony. We disagree. "The decision whether to order the sequestration of a witness is left to the discretion of the trial court." *People v. Jehnsen*, 183 Mich.App 305, 309; 454 NW2d 250 (1990).

The prosecutor requested that her expert witness be allowed to listen to defendant's expert because he had not prepared a report concerning defendant's insanity defense. All discussions concerning the sequestration of witnesses, including the prosecutor's request for her expert to listen to defendant's expert's testimony, took place outside the jury's presence. Furthermore, defendant's argument that the prosecutor's expert had no need to listen to his expert because she had all of his notes, diagnosis, and medical records, fails to note the instances during defendant's expert's testimony in which the prosecutor notified the trial court that the expert was relying on information that had not been provided to the prosecutor. The trial court took a recess during the expert's testimony after a reference to a second report that had not been received by the prosecutor or her expert and specifically allowed the experts to compare their information to make certain that the prosecutor's expert actually had all of the information and did not need more time. Therefore, the trial court did not abuse its discretion by allowing the prosecutor's expert to listen to defendant's expert's testimony.

Next, defendant claims that the trial court made several instructional errors. After de novo review of the instructions in their entirety to determine if they fairly presented the issues to be tried and sufficiently protected defendant's rights, we disagree. See *People v. Heikkinen,* 250 Mich.App 322, 327; 646 NW2d 190 (2002).

First, defendant claims that the trial court erred in reading the whole of CJI 2d 20.9 to the jury when no evidence of several of the factors listed in the instruction for determining whether the victim suffered mental anguish was admitted during trial. Specifically, defendant argues that no evidence was presented that the victim needed psychological treatment or medication, that the [sic] was angry or that the emotional effects lasted a long time. However, the trial court instructed the jury that no single factor was necessary and that the list was not all inclusive. Regardless, the evidence admitted at trial that defendant beat the victim, leaving her bruised and bloody, and threatened to kill her parents and her if she screamed during the assault, was sufficient alone to satisfy the requirement of mental anguish. Therefore, defendant has failed to show how the inclusion of the standard list of factors to be considered when determining whether the victim suffered mental anguish was unfairly prejudicial to defendant.

Second, defendant claims that the trial court plainly erred by failing to properly instruct the jury regarding his insanity defense. We disagree. Defendant did not object to the insanity defense instruction challenged on appeal and, when given the opportunity to note any corrections needed to the instructions given, indicated his acceptance of the instructions; therefore, defendant has waived this issue on appeal. See *Carter, supra.* Because defendant waived this

right, there is no error to review. See *id.* at 219. Regardless, pursuant to MCL 768.20a(3) [and MCL 768.36(1)], defendant has the burden of proving his defense of legal insanity by a preponderance of the evidence. *People v. Carpenter,* 464 Mich. 223, 231; 627 NW2d 276 (2001). Therefore, contrary to defendant's assertion on appeal, the instruction correctly advised the jury of the burdens of proof regarding defendant's legal insanity defense.

Third, defendant asserts that the trial court erred in reading a dictionary definition to the jury of the word "substantial" and claims that this definition was "probably misleading." However, defendant fails to explain how the definition given would be misleading. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority;" thus, the issue is abandoned. See *People v. Kelly,* 231 Mich.App 627, 640-641; 588 NW2d 480 (1998).

Next, defendant claims that the prosecutor committed misconduct by arguing that the relevant area of expertise in this case was forensic examining rather than psychiatry and that the prosecutor's expert witness, a forensic psychologist, was better qualified to give an opinion as to defendant's ability to appreciate the wrongfulness of his conduct and control his actions than defendant's expert witness, a psychiatrist. We disagree. A claim of prosecutorial misconduct is a constitutional issue which is reviewed de novo. *People v. Abraham,* 256 Mich.App 265, 272; 662 NW2d 836 (2003). However, this issue is not preserved and, therefore, is reviewed for plain error affecting substantial rights. See *Carines, supra.*

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v. Watson,* 245 Mich.App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v. Thomas,* 260 Mich.App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v. Rodriguez,* 251 Mich.App 10, 30; 650 NW2d 96 (2002).

Defendant's argument assumes that there was only one relevant area of expertise; however, the trial court specifically found defendant's expert to be qualified as an expert in psychiatry and the prosecutor's expert to be qualified as an expert in forensic examining. A prosecutor is allowed to argue, based on the facts, that one witness is more believable than another. *People v. Launsburry,* 217 Mich.App 358, 361; 551 NW2d 460 (1996). Therefore, the prosecutor was allowed to argue that, based on defendant's expert's lack of experience in making determinations specifically regarding the defense of legal insanity and the prosecution's expert's experience in making the same determination, that the jury should give the prosecution's expert's opinion more weight. Defendant has not only failed to demonstrate prosecutorial misconduct constituting plain error affecting his substantial rights, he has failed to demonstrate misconduct at all.

Defendant also asserts that the prosecutor committed misconduct during her rebuttal closing argument by stating that there really is no legal defense of insanity because such a defense depends on medical opinion testimony which can never be sufficient to establish the defense. We disagree that the prosecutor made such a

statement. Defendant misconstrues the prosecutor's response to his counsel's statement during closing argument that the EEG completed on defendant showing abnormal activity was a physical test proving his condition. Taken in context, the prosecutor's remarks were an appropriate response to defendant's argument.

Next, defendant argues that he received ineffective assistance of counsel from Ronald Plunkett, the attorney that initially represented him, and from his trial counsel, Barry Resnick, for failure to object to the unpreserved errors addressed above. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v. LeBlanc,* 465 Mich. 575, 579; 640 NW2d 246 (2002).

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v. Toma,* 462 Mich. 281, 302-303; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v. Rodgers,* 248 Mich.App 702, 714; 645 NW2d 294 (2001).

Defendant first argues that his prior counsel, Ronald Plunkett, either misrepresented or lied to the trial court in

chambers about a perceived threat regarding defendant and/or his family and that these misrepresentations resulted in defendant's bond being cancelled, precluded the performance of a diagnostic test to confirm defendant's expert's diagnosis, and precluded interviews of defendant by independent forensic psychiatrists or psychologists. We disagree. The trial court heard testimony regarding these statements on July 9, 2003, and found Plunkett's testimony credible that certain statements were made the night before he withdrew as defendant's counsel on May 19, 2003, which, at the time, led him to believe that there was a threat of violence. This Court must give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

Furthermore, defendant has failed to explain why the necessary tests and examinations could not be performed and offers no proof of an inability to complete these tests and examinations other than the affidavit of defendant's expert in which he avers that he "was told that examinations outside of the jail were not possible" and that his "efforts to seek addition [sic] neurological evaluation of [defendant] was not possible as a result of [defendant] being incarcerated." Furthermore, there is no indication in the lower court record that defendant moved the trial court for permission to complete these examinations between the time that Plunkett withdrew his representation until trial. Therefore, defendant has failed to show that completion of the desired tests and examinations were impossible because defendant was remanded to jail.

And, even assuming that such tests were impossible and assuming that such tests would confirm defendant's expert's diagnosis that defendant suffered from complex

partial seizure, defendant has failed to show that the outcome of his case would have been different had such confirmation taken place. Both experts at trial testified that, in their opinion, defendant suffered from a mental illness and the jury found him guilty but mentally ill. While the experts disagreed as to whether defendant knew his actions were wrong and could control his actions, the jury chose to believe the prosecution's expert who based her opinion that defendant was in control and knew what he was doing on the victim's statement and description of the actions wherein she noted that he seemed to being [sic] "thinking hard," and held her down and muffled her screams. Therefore, defendant has not demonstrated a reasonable probability that the result of the proceedings would have been different had defendant's bond not been revoked.

Defendant also argues that he received ineffective assistance of counsel from Plunkett because it was clear that, on the eve of trial, Plunkett was not prepared to represent defendant at trial and had not prepared an insanity defense. While a lack of preparedness to go to trial can be ineffective assistance, when making such a claim, a defendant is required to show that the lack of preparation prejudiced him. *People v. Caballero,* 184 Mich.App 636, 640; 459 NW2d 80 (1990). Defendant's argument lacks merit because Plunkett did not represent him at trial and defendant's trial attorney was allowed additional time in which to prepare after taking over the case. Defendant does not assert that his actual trial counsel was unprepared. Therefore, even assuming that Plunkett was unprepared, defendant has not shown that he was prejudiced where his actual trial counsel requested and received additional time in which to prepare for trial.

Defendant also asserts that he received ineffective assistance of counsel from Plunkett because Plunkett failed to file the required notice, under MCL 750.520j(2), that defendant intended to question the victim about their prior sexual conduct and misinformed the police about defendant's clothes being washed so that testing was never completed on the clothes. We disagree.

MCL 750.520j(2) requires a defendant proposing to offer evidence of a victim's past sexual conduct with the defendant to file within ten days of arraignment a written motion and offer of proof regarding the proposed evidence. In this case, the trial court granted the prosecutor's motion to exclude this evidence based on the lack of the proper notice; however, the trial court changed its decision after the prosecutor referred to defendant wanting to have sex with the victim "one more time" in her opening statement and allowed defendant to cross-examine her about this previous sexual conduct. Defense counsel was then able to question the victim as to why she continued to talk to defendant after these relations and, amidst her refusal to rekindle their relationship, she admitted that defendant had never forced her to do anything before. Furthermore, defendant's expert testified as to portions of the victim's preliminary examination testimony, that he used in his diagnosis of defendant, and read a portion, which included questions to the victim about whether defendant had ever scared or threatened her in the past before having sexual relations with her. Therefore, the jury knew from previous testimony that the victim and defendant had dated for over two years and, because of defendant's cross-examination, knew that the two had been sexually intimate. While defendant argues that he was not allowed to elicit testimony from the victim regarding her desire to

keep her sexual activity from her parents, this ignores the trial court's specific direction to defendant's trial counsel to request a hearing if he wished to pursue testimony outside the scope of its limitation. No such request was made. Defendant has failed to show that he was prejudiced by Plunkett's failure to file the required notice.

Furthermore, defendant's argument that valuable evidence might have been lost because his clothes were never tested lacks merit. This argument ignores the fact that all of the victim's clothes were tested as were the swabs taken as a part of her rape kit and all of this evidence tested negative for semen. Logically, the absence of semen either in the victim or on her clothes supports the same argument that defendant makes; however, the jury also heard testimony that the absence of semen does not necessarily mean that a sexual assault did not occur. Given the evidence actually admitted in this case, defendant has failed to explain how he was prejudiced by this lack of testing.

Defendant finally argues that he received ineffective assistance of counsel from Plunkett because Plunkett misrepresented the time defendant might serve if he accepted the plea offer and communicated the offer to him only the night before trial. We disagree. Defendant argues that Plunkett told defendant that he would serve only two or three years in prison and that such advice is dangerously incompetent as defendant would realistically serve much longer if he pleaded guilty to two counts of third-degree CSC. However, defendant refused this offer and continued to trial under new representation; therefore, defendant has failed to show how this advice prejudiced him.

Defendant's claim that he was deprived of effective assistance of counsel because his trial counsel failed to object to the assertions of error addressed on appeal lacks merit because counsel is not required to advocate a meritless position. See *People v. Snider,* 239 Mich.App 393, 425; 608 NW2d 502 (2000). As noted above, defendant has failed to show any prosecutorial misconduct, instructional error, or improper admission of evidence. Therefore, his trial counsel was not ineffective for failing to object to these assertions of error.

Next, defendant argues that he is entitled to resentencing because the trial court considered defendant's refusal to admit guilt during sentencing. We disagree. The trial court may consider evidence of a lack of remorse during sentencing; however, resentencing is required if it is apparent that the trial court erroneously considered the defendant's failure to admit guilt. *People v. Spanke,* 254 Mich.App 642, 650; 658 NW2d 504 (2003). Defendant cites *People v. Wesley,* 428 Mich. 708, 713-714; 411 NW2d 159 (1987), for the premise that an "indication" of the following three factors shows improper influence of defendant's refusal to admit his guilt in the trial court's sentence: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." However, our Supreme Court's analysis in *Wesley, supra* at 716, indicates that a request for the admission of guilt as well as an offer to lessen defendant's sentence in exchange for the admission are required to show an improper influence on the trial court of defendant's refusal to admit guilt. The trial court did not ask defendant to admit his guilt or offer him a reduced sentence in exchange for

such an admission; rather, the trial court appropriately considered defendant's lack of remorse in determining his ability to be reformed. See, also, *Spanke, supra.*

Defendant next asserts that the trial court incorrectly scored OV 2, OV 10, and OV 13, and that, because of this incorrect scoring, defendant's sentence exceeds the correct guidelines range. We disagree.

As for OV 2, lethal potential of weapon possessed, the victim testified that defendant picked up a pair of scissors from her nightstand and held them to her, i.e., "the offender possessed" a "cutting or stabbing weapon." See MCL 777.32. Therefore, evidence supported the scoring of OV 2 at five points and the trial court did not abuse its discretion in scoring the offense variable accordingly.[1]

With regard to OV 10, exploitation of a vulnerable victim, the evidence clearly indicated that defendant gained access to and sexually assaulted the victim as a consequence of their former romantic relationship, and after the victim declined to resume that relationship. See MCL 777.40; see, also, MCL 750.81a(2). Therefore, the trial court did not abuse its discretion in scoring OV 10 at ten points.

And, regarding OV 13, continuing pattern of criminal behavior, the evidence clearly indicated that defendant committed three or more crimes against the victim within

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[1] Defendant argues that, pursuant to *Blakely v. Washington*, 542 U.S. ___; 124 S Ct 2531; 159 L.Ed.2d 403 (2004), the trial court erred in considering facts not found by the jury in scoring OV 2 and OV 10. However, *Blakely* does not apply to Michigan's sentencing guideline system. *People v. Claypool*, 470 Mich. 715, 730 n 14; 684 NW2d 278 (2004).

a five year period, i.e., the sentencing offenses. See MCL 777.43. Each forcible sexual penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and relevant case law. MCL 750.520b; *People v. Dowdy,* 148 Mich.App 517, 521; 384 NW2d 820 (1986) (legislature intended to punish each criminal sexual penetration separately). Therefore, the trial court did not abuse its discretion in counting each offense as part of defendant's pattern of criminal behavior and scoring OV 13 at twenty-five points. In sum, OV 2, 10, and 13 were scored correctly; thus, defendant's sentence is within the appropriate guidelines range and this issue is without merit.

We decline to address defendant's remaining issues because he has failed to properly address their merits and, therefore, has abandoned them. See *Kelly, supra.*

Affirmed.

712 N.W.2d 448

Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Craig Michael HASKELL, Defendant-Appellant.

Docket Nos. 129303 & (91).

COA No. 251929.

April 26, 2006.

On order of the Court, the application for leave to appeal the June 23, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to appear and practice is DENIED as moot.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF LIVINGSTON

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs. Case No.: 02-013073-FC

CRAIG M. HASKELL,

Defendant.

_____/

SENTENCING

TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HON. DANIEL A. BURRESS,
CIRCUIT JUDGE

Howell, Michigan – Thursday, October 2nd, 2003

APPEARANCES:

For the People: MS. PAMELA J. MAAS (P-40452)
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TABLE OF CONTENTS

Page

Victim's Statement to the Court 4

WITNESSES – PEOPLE:
None

WITNESSES – DEFENDANT:
None

EXHIBITS: Identified: Admitted:
None

[3] Howell, Michigan

Thursday, October 2nd, 2003

At 2:59 p.m.

THE CLERK: *People* vs., *People* vs. *Craig Haskell,* file number 02-13073.

MS. MAAS: May it please the Court, Pamela Maas on behalf of the People.

MR. RESNICK: Your Honor, Barry Resnick appearing on behalf of Mr. Haskell.

THE COURT: Your name, please?

DEFENDANT HASKELL: Craig Michael Haskell.

THE COURT: Mr. Haskell, you were convicted of Criminal Sexual Conduct, First Degree, four times, Domestic Violence, Aggravated Domestic Violence once, and Criminal Sexual Conduct Second Degree, one Count. Today is the day and date for Sentencing. Have you read the Pre-Sentence Report?

DEFENDANT HASKELL: Yes.

THE COURT: The Prosecution wish to say anything? Is there anyone under the Act?

MS. MAAS: Your Honor, I would indicate that the victim of this crime, Rae Russell, is present and she does wish to address the Court.

THE COURT: Would you vacate the lectern, [4] please? Would you state your name, please?

MS. RUSSELL: Rae Russell.

THE COURT: What would you like to tell me?

MS. RUSSELL: Well, I haven't. . . .

THE COURT: And Miss Russell before you do, I just want you to know that I have read the Pre-Sentence Report thoroughly and I've read your Victim Impact Statement, as well.

MS. RUSSELL: Okay.

THE COURT: Thank you.

MS. RUSSELL: To who's [sic] his life may concern. I was lying naked and raped in my bed with the comforter wrapped around my blood covered body and I was overwhelmingly happy. Looking back at this moment in my life, I think, how could I possibly have been happy? The answer is because the hour before this event I was being beaten and raped to the point of helplessness. To have it be over and to be covered up and let the fabric soak up my blood pouring from nose rather than let it go all over my skin was heaven compared to what preceded that moment. I often think of this moment and other moments from that night. I can't help but think that there was some way I could have prevented it all. But there are times

when it is hard [5] for me to realize that it wasn't my fault. It was probably, it will probably still take a lot of time for the feelings of regret and guilt to be overcome by new trust and hope. I have decided to go see a counselor to try and rid myself of the reoccurring dreams. Hopefully, talking to someone on a professional level will allow me to be able to trust the male gender again. So far this selfish act of violence has taken a year-and-a-half of my life. Instead of having a year-and-a-half of running track and cross-country and going to college I've had to battle adjourned Court dates and fear of standing in front of two dozen complete strangers in answering questions about my personal sex life in violation of that privacy. This privacy is something every other person in the world has to their-selves.

There are a few things I want my future to form into. I wanna finish school and become a doctor. I wanna run this season faster than I've ever dreamed about. I want to move up North and live on a lake. All of these things I've dreamed about I wanna be able to do without thinking of something that happened to me on my 19th birthday.

In two more years I will graduate college with [6] a degree in Health Science. In five years, I will have my Doctorate in Physical Therapy. In ten years from now, I will hopefully be buying my house on my lake and starting a completely new life apart from this life. With all the plans I have for my future I know there is no way I will ever, ever forget lying naked in my bed with my comforter soaking up my blood and only being able to see out of one eye because the other one is too swollen. So even though I will be away from my fish comforter and a time when I could only see out of one eye, I will still remember it. My physical injuries will be long healed but the emotional

scars will be with me even when I buy my first house, when I start my first family, when I have daughters, and when Craig gets released from prison.

If ten years from now Craig gets released from prison, it will only strike up old memories that will force me to remember. That could be crucial to my new life then. In ten years from now Craig will be thirty-three. I can't imagine anything like what happened to me happening to another girl. I feel like, I feel that the longer he will be in jail the better I will be able to sleep at night. How can you put a number on someone's life? There [7] a lot of numbers that are certain in my life. Nineteen is how old I turned on my birthday when I had a black eye. Three is the number of months I had headaches after the concussion from having my head slammed into a dresser. Eighteen is the number of months I've had to wait to see the out-come of this Court case. With today being October 2nd, five hundred and three is the number of days I've thought about being beaten and raped. I just put five numbers on my life. I'm sure there can be one put on someone's who's put so many numbers on me.

I learned a lot of things about myself over the last year-and-a-half. I learned that when I'm nervous, like talking, standing in Court, I shake uncontrollably. I learned that no matter what kind of shape I am in from college sports, I can't fight someone stronger than me. I learned that no matter how much someone is hurting me and how much I hate them I will never be able to punch another person in the face. I learned that, I learned what it feels like to be hit directly in the face. I learned what a concussion feels like. I learned how a rape kit is administered in hospitals and what it's like to have a male doctor give [8] me an exam. I learned how my family members'

faces looked when their hearts are breaking and I learned how sensitive and long-winded the judicial system is. I hope that Craig learns as much as I did while he is in jail.

THE COURT: Thank you very much.

MS. MAAS: And I have just one other question. With respect to, you indicated that you are going to be getting additional counseling. Have you already received counseling as a result of this incident, Rae?

MS. RUSSELL: Yes, last year when school started. In September I went to counseling.

MS. MAAS: Alright.

THE COURT: Thank you.

MS. MAAS: Thank you, Rae. And your Honor, I don't know that I can speak anymore. I think she has spoken volumes about how serious this is. And I, I can think of nothing more serious, and while I know the Court has received a stack of letters from people who's [sic] hearts are breaking as a result of what happened, what they perceive having happened to Craig Haskell, this is something that he brought on himself. This is something that he did, and this is something that the jury has [9] found him guilty for. And unfortunately, sometimes, there is no limit to the inhumanity that human beings will commit upon other human beings. And sometimes we search for a reason and for an answer, and sometimes there is no reason. Sometimes there is no answer to why as something as evil as what Craig Haskell did to Rae Russell in this case has happened. And so because of that, your Honor, I think that it is imperative that the Court sentence this Defendant to the mid-, to the high end of the

Guidelines in this case and the Court affix a substantial maximum sentence in this case, so perhaps the fear of this happening to someone else will not be there for Miss Russell as she begins, hopefully, the next part of her life.

THE COURT: Thank you. Mr. Resnick, have you read the Report? If so, any corrections, additions, deletions?

MR. RESNICK: Yes, your Honor.

THE COURT: The Guidelines in this case have been scored at a hundred and eight to a hundred and eighty months. Are they correct, and is there anything that you would like to say?

MR. RESNICK: Your Honor, I don't believe the Guidelines are correct. I first wanna indicate to [10] your Honor, let's go to page one, actually page two of the Guideline Sentencing range of a hundred and eight to a hundred and eighty months. Your Honor, I believe that those Guidelines are scored incorrectly as follows.

THE COURT: Okay, just a second till I get there. Okay, your first objection?

MR. RESNICK: My first objection, your Honor, that I believe that the correct Guidelines scoring is forty-two to seventy months. . . .

THE COURT: Wait. Let's, let's break them down.

MR. RESNICK: Alright. As far as the . . .

THE COURT: One by one.

MR. RESNICK: Alright. The PRV's, your Honor, I have no objection, I have no objection to. It's the OV's that I would like to object as follows. OV 2, the Probation Department scores it as five indicating a weapon was used. Your Honor, the Court found the Defendant not guilty of Felonious Assault, specifically not guilty of using any kind of a weapon in an assaultive manner. And therefore, I believe that that OV2 should be scored as zero.

MS. MAAS: In response, your Honor, while the jury found that there was not evidence to prove [11] beyond a reasonable doubt that a weapon was used I ask the Court to refer back to the trial testimony where Rae Russell testified that during the course of the assault the Defendant used scissors and threatened her with them. And while it may not have risen to the level that the jury accepted as beyond a reasonable doubt, partially because there was some bungling of evidence collection in the post-investigative proceedings by the police department, I think that what the standard is, is that there is a preponderance of evidence to establish that there was a weapon, and there is no requirement under the Guidelines that there actually be a conviction for the Court to find this scoring appropriate. So I am respectfully requesting this Court leave the scoring as it is, which is five points under OV2.

THE COURT: Reply?

MR. RESNICK: Well, only not, not only, your Honor, did the jury find him not guilty of that offense, there was also never a weapon that was ever offered into evidence in this case. And to use that as a Guideline, especially when Defendant was found not guilty of that, I believe is improper and I would object to the scoring of

that Variable [12] as a five, I believe that the proper scoring is two.

THE COURT: There was testimony during the course of the Trial that a knife was brandished and displayed. . . .

MR. RESNICK: Not knife.

THE COURT: . . . and used.

MS. MAAS: Scissors.

MR. RESNICK: Scissors, your Honor.

THE COURT: Or scissors, and I, sorry. Thank you.

MR. RESNICK: Well, there was, there was . . .

THE COURT: Alright?

MR. RESNICK: . . . testimony to that effect. However, the jury obviously did not believe that testimony.

THE COURT: The testimony was unrebutted.

MR. RESNICK: It was rebutted by a verdict of not guilty.

THE COURT: The testimony was unrebutted. The verdict was an opinion.

MR. RESNICK: Well, your Honor, my objection. . . .

THE COURT: Right? Am I right that the testimony was unrebutted?

MR. RESNICK: Yeah, there was no, the, yeah.

[13] There was no testimony to the contrary, other than a weapon wasn't found and the officer testified that he didn't recall seeing any weapon when he got there. I believe, in effect, that rebuts it.

THE COURT: I'm gonna overrule the objection. I'm satisfied there is sufficient evidence on the record that scissors were used.

MR. RESNICK: Your Honor, in regards to Offense Variable 4, they scored it a ten as being the victim receiving psychological counseling. When I read the Pre-Sentence Report and the Victim's Impact Statement I was led to believe that there was no counseling. That the only thing the Complainant was thinking about is, is trying to get counseling in the future. It's. . . .

THE COURT: You heard this morning, or this afternoon that there was counseling.

MR. RESNICK: I did, I did hear that there was, your Honor. But my objection is still to that Variable.

THE COURT: I'll overrule it.

MR. RESNICK: Your Honor, in regards to Offense Variable 10, I believe that there was no exploitation of the victim's vulnerability and there was not a domestic violence, domestic situation inasmuch [14] as that domestic relationship by Complainant's own testimony ended. Therefore, I would object to the ten points being added there.

THE COURT: Response?

MS. MAAS: In response, your Honor, it was clear that the Defendant was able to come over and was

trying to exploit the fact that he had been involved in a relationship with her in the past. He was using that relationship coupled with his troubles to evoke sympathy from the victim. He tried to get her to come closer to him, to be involved in this, and when she rebuffed his advances that is when he struck her and the assault began. I think it is clear from the facts and the Trial in this case that he did exploit that prior relationship that they had and points are appropriately scored under this Variable.

THE COURT: Reply?

MR. RESNICK: Your Honor, I believe that there was no exploitation. The domestic relationship by her own testimony ended. Therefore, I think that that scoring of ten points should be zero.

THE COURT: I'll overrule it. I'm satisfied that the scoring was correct.

MR. RESNICK: And finally, your Honor, Offense [15] Variable 13 they scored it as 25. I believe there is no pattern of felonious, criminal activities. I believe that there was only the two acts, not the three acts, one being the Criminal Sexual Conduct and the other act being the Domestic Violence. Therefore, I would object to the scoring of that at twenty-five.

THE COURT: Reply?

MS. MAAS: Your Honor, the Defendant was convicted of five Counts of Criminal Sexual Conduct during the course of this act. He not only engaged in sexual intercourse with this victim on three separate occasions, he digitally penetrated her, and then on a separate occasion from that he sexually touched her. Not to mention the fact that there did seem to be, on the

Sunday prior to this incident, again, a forced or coerced sexual act. And I think in light of all of that the points as scored as twenty-five are appropriate.

THE COURT: Reply?

MR. RESNICK: Your Honor, I believe that the, the objection that I indicated is an appropriate recommendation. I think that, I recall the testimony, I only recall testimony of one act of sexual intercourse, one penetration. And therefore, and [16] the Domestic Assault, and therefore, I would object to the scoring of that Variable as twenty-five. I believe it's probably scored as zero.

THE COURT: I'll overrule. I'm satisfied that it's correctly scored.

MR. RESNICK: My next objection, your Honor, I believe that on the evaluation and plans. . . .

THE COURT: Having said that, are the Guidelines as scored correct? A hundred eight to a hundred and eighty?

MR. RESNICK: The Guidelines as corr-, as scored by the Probation Department reflects that scoring even though I objected. . . .

THE COURT: I understand.

MR. RESNICK: . . . to that.

THE COURT: But. . . .

MR. RESNICK: But yeah, they're scoring at a hundred and eight to a hundred and eighty based on those Variables is a. . . .

THE COURT: Okay.

MR. RESNICK: . . . correct score.

THE COURT: Alright. Go ahead.

MR. RESNICK: Your Honor, in regard to the evaluation and plan I believe that there are some errors in that. In the top paragraph, part of it [17] indicates that the Defendant was convicted of Assault with Intent to Commit Sexual Contact. I don't believe he was ever . . .

MS. MAAS: He was actually, that would be correct. It's actually Second Degree Criminal Sexual Conduct.

MR. RESNICK: And I believe that should be Count VII, if I'm correct.

THE COURT: That's VII and that's Second Degree, right?

MR. RESNICK: Right.

MS. MAAS: Correct.

THE COURT: Alright, I'll put Criminal Sexual Contact Second Degree.

MR. RESNICK: Your Honor, in regards to the last paragraph, it appears that the, that the Probation Department indicates that the seizure for which the Defendant suffered, the partial complex seizure, is a physical ailment rather than a mental health one. I don't know how the Probation Department was able to form a medical opinion inasmuch as both the forensic psychologist as well as Dr. Pitts indicated that this is a mental illness not a physical ailment, and I would ask that that be stricken.

[18] PROBATION OFFICER: Your Honor, I spoke with the treating psychiatrist and that's what he told me.

MR. RESNICK: Your Honor, there's never been a report. He's never testified to that. If she believes that that's what he said, then she miscalculated or misunderstood what he said. The testimony, even, even the forensic psychologist who testified in Court said he had a mental illness.

THE COURT: I'm going to leave it the way it is know [sic] based upon what she has said and if anyone wants to furnish me anything within ten days that requires either a Hearing or a Reconsideration I'd be glad to look at it.

MR. RESNICK: Also, in regards to the last page, your Honor, it indicates Defendant is not currently prescribed any psychotropic medication. . . .

MS. MAAS: I'm sorry, which page?

THE COURT: Same page.

MR. RESNICK: Same page. . . .

MS. MAAS: Oh, I'm sorry.

MR. RESNICK: . . . last paragraph. Your Honor, he had been, the psychiatrist, based on things that were going on with his evaluation of the Defendant, reinstablished [sic] all of his medications so he is in fact now taking all of that, all of that medication.

[19] MS. MAAS: Your Honor, I just want the Court to be aware that I was advised by jail administrator, Randy Evans, that in fact through some circumstance that

had occurred, Dr. Pitts was allowed a visit and was, and did in fact stop Defendant's medications because they were trying to see if symptoms would reoccur. So I was advised that by, now if he's now reinstated them, but I think at the time of this report this was correct because that is what jail administrator. . . .

MR. RESNICK: Your Honor, I'm not . . .

MS. MAAS: . . . advised me.

MR. RESNICK: . . . I'm not challenging that. That is correct, that the doctor did order that that [sic] medication, you know. . . .

THE COURT: I will take it. . . .

MR. RESNICK: . . . be withdrawn, but. . . .

THE COURT: I. . .

MR. RESNICK: . . . it is in sense, it is now, and I think that's very important because inasmuch as Defendant was found guilty but mentally ill he had to be referred for a evaluation to determine his mental illness.

THE COURT: I will take what you say into consideration. I am sure that he will be evaluated [20] based upon the jury's verdict.

MR. RESNICK: In regards to the, the next paragraph, I'm sorry, the next page, evaluation and plan again, I wanna indicate in the second paragraph it says that:

"Mr. Haskell suffers from a physical condition. . . .

I would like that, to correct it as a mental condition as testified to by both the forensic psychologist and Dr. Pitts.

PROBATION OFFICER: And again, your Honor, that's what the treating psychiatrist told me.

THE COURT: I'll leave it that way unless you correct it within ten days.

MR. RESNICK: Your Honor, in regards to the health section, which I think is about another four pages, it, it, on the bottom paragraph, Mental Health. . . .

THE COURT: What page?

MR. RESNICK: . . . it again says he was taken off. . . .

THE COURT: What page number?

MS. MAAS: Page seven, your Honor.

THE COURT: Thanks.

MR. RESNICK: Your Honor, it says he was taken [21] off of all medications. Again, he's been put on all medications.

THE COURT: I'll take that into account.

MR. RESNICK: And then the next page, again, I wanna change physical condition into mental illness.

THE COURT: Same ruling.

MR. RESNICK: And, and that would the [sic] corrections that I would like to be made on the Pre-Sentence Report.

THE COURT: What would you like to tell me?

MR. RESNICK: Your Honor, I would also like to indicate that I know that the Court has received a booklet of letters that I believe encompassed over seventy letters. . . .

THE COURT: It's not a booklet, but I got 'em all.

MR. RESNICK: Right.

THE COURT: You're right, there's at least seventy.

MR. RESNICK: Alright. And I'm sure that the Court, based on the Court's prior practice has read on all those letters?

THE COURT: Each and every one.

MR. RESNICK: I know that, and that's what I've indicated. I don't want to at this time. . . .

[22] THE COURT: Starting, starting last night and then picking up after some sleep at five this morning.

MR. RESNICK: Your Honor, I think that these are not letters that are written by seventy boyfriends of Craig Haskell. These are letters that were written, going all the way back to his school teachers, all the way back to his coaches, going back to girls that he dated and the parents of those girls who testifi-, who, who gave testimonial letters, from girlfriends, former girlfriends that he has dated and had a relationship with, from obviously from parents, and obviously from friends.

Your Honor, I also forwarded and filed with this Court an extensive Sentencing Memorandum . . .

THE COURT: And I've, and I've . . .

MR. RESNICK: . . . and . . . .

THE COURT: . . . read that, too, and thank you for doing it.

MR. RESNICK: And I'm not going to, going to go into detail as to each and every one of those things. But what I'd like to indicate and as I've indicated to this Court I think that the common, in the Sentencing Memorandum, is that the common thread, I believe, of all these letters indicate [23] that:

> " . . . Craig has always shown the utmost respect and consideration from every-, anyone and no one believes that he could have consciously caused any harm to any human being, let alone Rae Russell."

And, and "consciously," I mean knowingly and intentionally doing that. They also indicate:

> " . . . that these crimes for which he is being convicted are so beneath his dignity and moral values as they have known him through the twenty-two years of his existence that is difficult for anyone to believe that these offenses could have been committed consciously and rationally by Craig Haskell."

I know that the Court hears, all the time, defense attorneys indicating that they come into Court and they say, your Honor, I think that you should take into consideration that my client at the time of this incident, whatever that incident may be, was high on drugs, high on alcohol, injected with whatever, blaming these drugs and these alcohols, alcohol for their conduct. And the Court is. . . .

THE COURT: Just had that in the Sentence just preceding this one.

[24] MR. RESNICK: Right. And those people blame and, and the Court sits back and says, well, did anyone force you to take the drugs? Did anyone force you to take the marijuana? Did anyone force you to get high on alcohol? And the answer is "no." Those were voluntary acts on their part, alright, that caused them or at least gave them sometimes the courage to go out and commit the acts for which they committed and blame it on substance abuse and blame it on alcohol.

Your Honor, we have a totally different situation in this case. The Defendant as evidenced by the Forensic Center, as evidenced by the medical testimony, has a mental illness. I believe everyone was consistent from the Forensic Center, as well as Dr. Pitts, was consistent that he had a mental illness, and in fact, the jury found him guilty but mentally ill. It's also clear, and I know that the Court did listen to the testimony, had the letter from Dr. Pitts that the mental illness, or part of the mental illness was a complex partial seizure that affected his ability to understanding the rightfulness of his conduct. Now obviously, the jury by their verdict did not find the Defendant guilty, not guilty by reason of insanity, but did [25] feel that he had a mental illness. I think, your Honor, I think that the testimony indicates and I think that the letters and the testimonial letters indicate that but for that mental illness which he had no control of, it wasn't that he went out to the nickel and dime and party store and said, you know what? I'm gonna buy me a complex partial seizure so that I can have the seizure and go out and commit these offenses. This offense is totally atypical of anything that he's ever done in his life. He has never ever, ever been in any trouble. He has never been violent. He's never done anything to any other human being as indicated

in these letters until he had the bout with this mental illness which necessitated at least one or two suicide attempts, recently, before that incident, and culminated in the situation. And, and I say that because I know that the Court's attitude about people that voluntarily get into things and then use that as an excuse, should not be used as an excuse and he should be punished for getting into that. But here, this Defendant had no control over that mental illness. He had no control over that seizure and whether or not the jury believed that, [26] that he stole, knew right from wrong the facts still remains, your Honor, that he does have a mental illness, and but for that mental illness, this incident wouldn't have, wouldn't have occurred.

I think that the testimonial letters without any, any hesitation, and the Court has read each and every one of those letters, this, this activity, I mean, normally you see a person that is violent, a person that is involved in this type of activity has a history or at least a pattern, or something that's building up indicating an assaultive manner. Nothing in his body, nothing in his bones, nothing in his makeup has any violent tendencies whatsoever until this dreadful night in question when he had this illness which, which, which came to fruition, and maybe because of a lot different stressful things that occurred culminated in this incident. He has been consistent all along. He has been consistent with the Forensic Center. He's been consistent with doctors. He's been consistent with everyone, your Honor, that he does not recall. He remembers things going up to this and he remembers crying hysterically in front of his mother, "Oh my God, oh my God. What have I done?," when being confronted and seeing results of apparently what he

[27] must have done at least physically to her. And I'm not using that as an excuse, your Honor. I'm indicating that but for that mental illness which he had no control, I don't believe that this incident would have happened.

I am asking the Court, if the Court is not obviously going with my Guidelines, to sentence him to below the Guidelines or at the very minimum of the Guidelines as reflected by the Probation Department. I'd also ask the Court to vacate the other three convictions of CSC I because I believe the testimony that I recall is that there was only one sexual penetration. And therefore, I would ask that those other ones be vacated. Also your Honor, because the Defendant was found not guilty, 'er found guilty but mentally ill the Court has to sentence him to the Department of Corrections. However, 768.36 indicates that:

> " . . . the Defendant is to be evaluated either by Department of Corrections or from the Department of Ment-, of Community Health to determine whether or not he has, still has a mental illness. . . . "

And number two:

> " . . . as a result of that mental illness [28] is he a threat to himself or others. . . . "

If he is, then he is to be treated for that mental illness until that condition or that threat no longer exists and then he would go back to serve the remaining of his sentence. So I would ask that the Court in Sentencing him have him referred for an evaluation by the Department of Community Health, the Forensic Center for that determination under 768.36. I'd also like the Court, obviously, to mark this file medical and pay particular note to the

medication and psychiatric medications that he is, that he is on.

THE COURT: Mister, what would you like to tell me?

MR. RESNICK: Your Honor, he would like to read something to this Court.

DEFENDANT HASKELL: I've stood in, I've stood in this Courtroom many times over the past year always as an innocent man. I use to think America was a great country. Now I'm not so sure. I use to think our legal system was the benchmark that other countries strove for. Now I'm not so sure. I use to think that innocent people never went to prison. Now I know that is not true. After watching as teacher, mentor and friend choose [sic] death [29] over ostracism, Plato often spoke about truth and justice. He said they were abstract ideas that could never obtained. I disagree. What Plato failed to realize is that truth and justice do exist, just not on Earth. I know that one day I will truly be judged. I know that on that day my soul will pass freely through the gates to the kingdom I've been promised. This Court has taken a lot from me in the past year. It's taken my hopes, my dreams and now it has come for my freedom. But you can never have my mind or my soul. I know that one day the truth will come out and I stand before you still an innocent man.

THE COURT: Thank you. Miss Maas, on the question that was raised about vacating some of the. . . .

MS. MAAS: No. . . .

THE COURT: . . . Counts?

MS. MAAS: . . . that's, I, I don't know where counsel's coming from with that. There was testimony during the course of this Trial that there were three separate acts of digital penetration. There was one act of sexual intercourse and there was an act of sexually touching of both her breasts and vaginal area. The issue of vacation of any of those Counts is not appropriate. And I'm not sure under [30] what theory he's asking that, but the jury found beyond a reasonable doubt that there were each of those separate penetrations. If he was claiming a double jeopardy issue, I'm only supposing, but if that were one issue, again, the case law is clear that each act of penetration results in a separate conviction which is what occurred in this case.

THE COURT: Mr. Resnick, do I interpret your marks as being a Motion?

MR. RESNICK: No, I, I believe. . . .

THE COURT: Verbal Motion to correct this Judgment or pre-, the verdict of the jury?

MR. RESNICK: No, it's my request that . . .

THE COURT: Or is it elocution?

MR. RESNICK: No, it's elocution, and I'm requesting also that I don't believe that there, that the Complainant testified that there was one, more than one act of penetration. There was some, there was some attempts and there was an attempt with the scissors and there was some touching. And there can only be one conviction for one penetration and therefore, I would ask that the other Sentences be vacated.

THE COURT: I'm satisfied that that Motion should be denied. Mr. Haskell, you stand convicted [31] by a jury of your peers of Criminal Sexual Conduct in the First Degree, commonly known as Rape. One Count of Criminal Sexual Conduct in the Second Degree and one Count of Domestic Violence. Criminal Sexual Conduct in the First Degree is one of the most serious offenses on the books of this State and carries a potential maximum of life in prison. I must take into consideration the seriousness of the offense, the disciplining and the consideration of reformation of the Defendant, the protection of society and the deterrent affect of the sentence on others. Many of these factors are embraced within the Sentencing Guidelines which have been adopted in this State.

In this case, those Guidelines have been scored to suggest that I impose a minimum sentence of a hundred and eight and a hundred eighty months. In plain talk, that means a minimum sentence of between nine and fifteen years as a minimum. Such a sentence is a long time for anyone and must seem to be an eternity to someone twenty-two years of age. I am aware that there was a prior plea offer in this case which have allowed you to plead guilty to two Counts of Criminal Sexual Conduct Third Degree which carries, I think a maximum of fifteen [32] years. Am I correct?

MS. MAAS: You're correct.

THE COURT: With greatly reduced Guidelines, and that, of course, is water over the dam. A jury has found you guilty, notwithstanding your protesting to the contrary, a jury of your peers ha[illegible]ound you guilty but mentally ill. Mentally ill does not excuse the conduct. If you would have found to be insane, yes, but not mentally

ill and I cannot consider that that finding is an excuse to the conduct that took place in this case.

I sat through the trial. I've read the Pre-Sentence Report several times. I have considered the Sentencing Memorandum submitted by your lawyer and I have read every one of the seventy or so letters and other documents that had been attached to the Memorandum. They are all complimentary of you, your family and your past, and generally suggest that I be lenient in imposing Sentence. Among those letters are some, letters from some good friends of mine who's [sic] opinion I respect and value. Most of the letters express the feeling that they simply cannot comprehend that you are capable of the offense for which you, offenses for which you have been convicted. Although this [33] sentencing is mostly about you, the effects of an incident such as this is, has a devastating affect on your family, your relatives, your friends. It's just not you. It's your whole family that's affected by what took place here. And we haven't started to talk about the victim in this case yet and how devastating that was to her. And I am bound by the jury verdict. They chose to believe what she had to say. They chose to believe that you raped her. Now you may protest your, your innocence but that's a fact that unless a higher Court sets aside this verdict somehow, it's something that somehow you are going to have to accept.

What's troubling to me is that there is almost an inherent suggestion in the letters from many of the people saying they can't believe that you did this, an inherent, almost suggestion that the victim in this case is lying. The jury found otherwise. They had full opportunity to watch her, to listen to her. She was cross-examined thoroughly. She was put to the test of fire in this Courtroom and they

believed her. They found that the things that she said with the exception of one Count that they chose not to come in on, they found that her case had been proven to them beyond a reasonable doubt. [34] I don't see any remorse in this case. None. And it's bothersome to me. I took the bench today not knowing what I was going to do to you, and frankly, the statement that you made does not impress me. It almost makes me think that maybe some underlying feelings of suggestions that she's lying are really there and, and the persona of being wrongfully convicted is what this is all about. It's about you raping her. . . .

DEFENDANT HASKELL: No, it's not.

THE COURT: Oh, yes, it is. That's why we're here. It's about you raping her. It's precisely what it's all about. And frankly, I'm really having trouble with what I wanna do with you. Your lawyer wants me to be on the lenient side and even, even go below the Guidelines and I'm going to tell you that I couldn't find a legal reason to justify doing that. The only question I have is how much above the minimum should I go? And, and I'm troubled.

MR. RESNICK: Your Honor, and, and I never wanna interrupt the Court on the imposition of Sentence, but I think the letters indicate contrary to what your thought is that they're saying he's lying, that she's lying about this incident, I think [35] that the thing is they are saying that they don't believe that a conscious and rational Craig Haskell that they knew could have committed this. I think that's what the letters are saying. I don't think that the, any of those letters are saying she's lying, it never happened. You know, this is, this is a bunch of garbage. I don't think any of those letters are saying it. I think the

thread in each of those letters are saying that the person that they know, alright, would not have committed this offense. However, they understand the psychiatric and the mental illness that they had and they beli-, don't believe that he could have been in the right state of mind, totally rational, without any malice and have done this. I think that's what the letters are indicating. And I hope that the Court doesn't get affronted by that because I read 'em as saying quite the opposite. That Judge, we don't know what happened here. Obviously, we weren't there, but we do know that this person that we know, this person that we knew that didn't have a mental illness, that person with his background is not capable of this offense. What someone does under stress of mental illness, of, of snapping, obviously no one who, except for a person that's in that position, [36] you know, can answer that questions [sic]. But I don't think that those letters were an affront to your Honor by saying that she's lying. . . .

THE COURT: It's not an affront to me.

MR. RESNICK: No, I mean, I think that they were saying specifically that a conscious and rational Craig that they knew would not of, that they did not believe that he was capable of committing this offense and something must have happened and I think that something happened was the mental illness.

THE COURT: I don't see a thread or a thimble of remorse or of reaching out to the victim in this case and saying I'm sorry for what you have been put through.

MR. RESNICK: It says it right. . . .

THE COURT: Not. . . .

MR. RESNICK: . . . right in the Pre-Sentence Report it said. He said that he, if, he obviously caused, he obviously believed from seeing the Complainant that he caused the physical harm to her. He said that into the Probation Department and it's written right in the report for any. . . .

THE COURT: His statement just a few seconds ago did not convey remorse to me.

[37] MR. RESNICK: Because your Honor, I think that he believes that he, he himself, in, in not remembering this does not believe that he was capable of doing what he was claimed. And we don't know how tricky, and what happens to the mind and the mind is a, is a great teacher sometimes and it's a great leader sometimes and it causes us to sometimes do things that we normally wouldn't do. And I think in his soul and in his heart, and in his background, he doesn't believe that he is capable of doing the things that he was accused of doing sexually. He obviously knows that he had to have done what he did assaultively because the, the evidence and the physical evidence is right there. I think that's what he's saying, and I don't think that he means that any degree, that if in fact, there was a physical assault obviously which he, he can't deny having, that he was sorry for that. And he's indicated that, and he's indicated to the Probation Department. But I . . .

THE COURT: Mr. Resnick, I think it's a good thing that you interrupted me. I'm gonna take a five minute recess.

THE CLERK: All rise?

(At 3:40 p.m., the proceedings pause for a [38] short break.)

(At 3:47 p.m., the proceedings resume.)

THE COURT: Okay, we're back on the record. Both counsel and the Defendant present. Is there anything else anyone wants to say?

MS. MAAS: No, your Honor.

THE COURT: Mr. Resnick?

MR. RESNICK: No, your Honor. I would just wanna reiterate what I, I indicated. As far as the remorsefulness and, and I think, and I, and, and in talking to Craig even in back I don't believe he wanted to indicate or reflect to the Court that he believed that she was lying about the sexual assault part. What he's indicating is obviously, physically he must have done something to her and for that he is sorry, and that's what was indicated in the, in the report. But he doesn't believe in his own mind, if he was conscious, if he was rationale [sic], if he knew what he was doing, that he would have done what she claimed happened to her. And, and I think that's consistent with the letters, your Honor.

THE COURT: Alright. Anything else?

MR. RESNICK: No, your Honor.

THE COURT: On Count I, Criminal Sexual Conduct First Degree, it is the sentence of the Court that [39] you be committed to the Michigan Department of Corrections and serve a minimum of twelve years, maximum of thirty. Same sentence on Count II. Same sentence on Count V and VI. On Count IV, one year in the County

Jail, and on Count VII, a minimum of ten years, maximum of fifteen years. On all of these there will be credit for a hundred and thirty-eight days. On Count I, there will be a Sixty Dollar State fee, and the Sixty Dollar will be eli-. . . .

PROBATION OFFICER: Is waived.

THE COURT: Is waived, and the Crime Victims' will stay, right?

PROBATION OFFICER: Correct. And he will have the Sixty Dollar State costs on Counts II, V, VI and VII.

THE COURT: Correct.

PROBATION OFFICER: And Forty-Five Dollars on Count IV.

THE COURT: Correct. If you're dissatisfied with this Sentence you have the right to appeal. If you wish to do so, you must do so within forty-two days. If you don't have the money to hire a lawyer, one will be appointed for you and paid at County expense to represent you. I'm handing you [40] a form through your attorney. Sign the original, return it to the Court for filing. Keep a copy for processing an appeal if you're desirous of doing so.

MR. RESNICK: He has executed the receipt of the Notice of Appeal Rights.

THE COURT: Okay.

MR. RESNICK: Also.

THE COURT: And it's my understanding, Mr. Resnick, I did make inquiry through the Probation Department before Sentencing today about the evaluation

and I'm told that he will be processed in the normal manner and that they will make the evaluation at the Reception Center. Through the Reception Center.

MR. RESNICK: Right. The Forensic Center then will examine him, then?

MS. MAAS: No.

PROBATION OFFICER: No. The Department of Corrections.

THE COURT: Through the Department of Corrections. He'll go to the Department of Corrections. He'll get the Reception Center, and then they will make the appropriate arrangements for evaluation.

MR. RESNICK: Thank you, your Honor.

[41] MS. MAAS: Thank you, your Honor.

MRS. HASKELL: Craig, I love you. I believe in you, son.

(At 3:50 p.m., the proceedings conclude.)

[42] STATE OF MICHIGAN)

COUNTY OF LIVINGSTON)

I certify that this transcript, consisting of 42 pages is a complete, true and correct transcript of the proceedings taken in this case on Thursday, October 2nd, 2003. Some names and cases may be phonetically spelled.

Fara Duffey, CER 0904

(2)

No. 06-137

FILED
SEP 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CRAIG MICHAEL HASKELL,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Michigan

BRIEF IN OPPOSITION

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September 22, 2006

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was Petitioner sentenced to a longer term of imprisonment based on a claim of innocence?

II. Does Michigan's statute defining a "continuing pattern of criminal behavior" violate due process?

III. Where the statutory maximum sentence is not impacted by the sentencing guidelines, does Michigan's scheme of indeterminate sentencing violate the Sixth Amendment?

IV. Does Michigan's standard requiring an evidentiary hearing on an ineffective assistance of counsel challenge only where there is a disputed question of fact violate the Constitution?

TABLE OF CONTENTS

Counter-Statement of Questions Presented i

Table of Contents ii

Table of Authorities iv

Counter-Statement of the Case 1

Reasons for Denying the Petition 5

I. Petitioner was not subjected to a longer sentence based on his claim of innocence at sentencing. Petitioner conceded he showed no remorse and never claimed that an assertion of innocence cannot, as a matter of law, be considered as evidence of a lack of remorse . 5

II. The phrase "continuing pattern of criminal behavior" is a term defined by the Michigan Legislature. While Petitioner claimed at sentencing that the statutory definition had not been satisfied, Petitioner never challenged at any stage of this proceeding that the statute violates due process. Because the guideline variable was scored for conduct resulting in convictions, Petitioner fails to state a claim under *Blakely v Washington* 12

III. Because the guidelines have no impact on the statutory maximum sentence, Michigan's scheme of indeterminate sentencing does not violate *Blakely v. Washington*. In any event, Petitioner submitted to judicial factfinding . . 16

IV. Petitioner fails to allege or demonstrate how Michigan's standard for requiring an evidentiary hearing on an ineffective assistance of counsel challenge is the subject of dispute among the lower courts or violates the Constitution 25

Relief Requested 27

Appendix

Appendix 1 - Michigan Supreme Court Opinion of 5/31/05 . . . . . 1b

Appendix 2 - Michigan Court of Appeals Order of 9/1/04 . . . . . 2b

Appendix 3 - Mich. Comp. Laws § 769.34 (2002) . . 3b

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Blakely v. Washington,
542 U.S. 296; 124 S.Ct. 2531;
159 L.Ed.2d 403 (2004) . . . . . *passim*

Cunningham v California, No. 05-6551,
certiorari granted, 126 S.Ct. 1329 (2006) 23, 24

Geraci v. Senkowski,
211 F.3d 6 (2d Cir. 2000) 9

Geraci v. Senkowski,
23 F. Supp.2d 246 (E.D.N.Y. 1998) 9

Gomez v. Tennessee,
petition for certiorari filed August 15, 2005,
No. 05-296 24

Lopez v. State,
113 P.3d 713 (Colo. 2005) 23

McKune v. Lile,
536 U.S. 24; 122 S.Ct. 2017;
153 L.Ed.2d 47 (2002) 11

McMillan v Pennsylvania,
477 U.S. 79; 106 S.Ct. 2411;
91 L.Ed.2d 67 (1986) 20, 21

Ohio v. Johnson,
467 U.S. 493; 104 S.Ct. 2536;
81 L.Ed.2d 425 (1984) 12

People v. Babcock,
469 Mich. 247; 666 N.W.2d 231 (2003) 21

People v Black,
35 Cal.4th 1238; 113 P.3d 534 (2005) 23

People v. Calabro,
166 Mich. App. 389; 419 N.W.2d 791 (1988) 8

People v. Conley,
270 Mich. App. 301; 715 N.W.2d 377 (2006) 8

People v. Dowdy,
148 Mich. App. 517; 384 N.W.2d 820 (1986) 12

People v. Drohan,
475 Mich. 140; 715 N.W.2d 778 (2006),
petition for certiorari filed,
September 6, 2006, No. 06-6493 20

People v. Francisco,
474 Mich. 82; 711 N.W.2d 44 (2006) 15

People v. Haskell,
474 Mich. 1118; 712 N.W.2d 448 (2006) 5

People v. Haskell,
472 Mich. 913; 697 N.W.2d 152 (2005) 5

People v. McCuller,
475 Mich. 176; 715 N.W.2d 798 (2006),
petition for certiorari filed,
September 11, 2006, No. 06-6468 20

People v. Powe,
469 Mich. 1032; 679 N.W.2d 67 (2004) 18

People v. Wesley,
428 Mich. 708; 411 N.W.2d 159 (1987) 8, 11

Smylie v. State,
823 N.E.2d 679 (Ind. 2005) 23

State v. Allen,
359 N.C. 425; 615 S.E.2d 256 (2005) 23

State v. Brown,
209 Ariz. 200; 99 P.3d 15 (2004) 22

State v. Dilts,
337 Or. 645; 103 P.3d 95 (2004) 23

State v Gomez,
163 S.W.3d 632 (Tenn. 2005) 24

State v. Imlay,
249 Mont. 82; 813 P.2d 979 (1991) 9-10

State v. Kamana'o,
103 Hawaii 315; 82 P.3d 401 (2003) 11

State v Maugaotega,
107 Hawaii 399; 114 P.3d 905 (2005) 24

State v. Natale,
184 N.J. 458; 878 A.2d 724 (2005) 23

State v. Shattuck,
704 N.W.2d 131 (Minn. 2005) 23

State v. Shreves,
313 Mont. 262; 60 P.3d 991 (2002) 10

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543 U.S. 220; 125 S.Ct. 738;
160 L.Ed. 621 (2005) 24

United States v. Laca,
499 F.2d 922 (5th Cir. 1974) 9

United States v. Roe,
670 F.2d 956 (11th Cir. 1982) 9

United States v. Olano,
507 U.S. 725; 113 S.Ct. 1770;
123 L.Ed.2d 508 (1993) 18-19

United States v Watts,
519 U.S. 148; 117 S.Ct. 633;
136 L.Ed.2d 554 (1997) 22

United States v. Wright,
533 F.2d 214 (5th Cir. 1976) 9

Wesley v. Michigan,
484 U.S. 967; 108 S.Ct. 459;
98 L.Ed.2d 399 (1987) 8

Williams v. Stewart,
441 F.3d 1030 (9th Cir. 2006),
petition for certiorari filed August 28, 2006,
No. 06-6249 10

Statutes

Mich. Comp. Laws § 750.82(1) 22

Mich. Comp. Laws § 750.520b 2

Mich. Comp. Laws § 750.520c 2

Mich. Comp. Laws § 769.8(1) 4, 16

Mich. Comp. Laws § 769.9(2) 17

Mich. Comp. Laws § 769.31(b) 3-4

Mich. Comp. Laws § 769.34 3

Mich. Comp. Laws § 769.34(2) 17

Mich. Comp. Laws § 769.34(2)(b) 17

Mich. Comp. Laws § 769.34(3)(b) 21

Mich. Comp. Laws § 769.34(4)(d) 4

Mich. Comp. Laws § 777.22(1) 21

Mich. Comp. Laws § 777.31 21

Mich. Comp. Laws § 777.32 21

Mich. Comp. Laws § 777.32(1) 22

Mich. Comp. Laws § 777.33 21

Mich. Comp. Laws § 777.34 21

Mich. Comp. Laws § 777.37 21

Mich. Comp. Laws § 777.38 21

Mich. Comp. Laws § 777.39 21

Mich. Comp. Laws § 777.40 21

Mich. Comp. Laws § 777.41 21

Mich. Comp. Laws § 777.42 21

Mich. Comp. Laws § 777.43 . . . . . 12, 21

Mich. Comp. Laws § 777.44 21

Mich. Comp. Laws § 777.49 21

Mich. Comp. Laws § 777.49a 21

Mich. Comp. Laws § 791.232 *et seq* 18

Mich. Comp. Laws § 791.234 20

N.C. Gen. Stat. § 15A-1340.17(d), (e) (2003) 23

Rules

Fed. R. Civ. P. 56(c) 26

Mich. Ct. R. 7.104(D) 20

Mich. Ct. R. 7.211(C) 4

Mich. Ct. R. 7.211(C)(a) 25

COUNTER-STATEMENT OF THE CASE

Petitioner's statement of facts trivializes the violence of the sexual assault on the victim.

Petitioner and the victim dated in high school over a two year period. (186).[1] While attending different colleges, they broke up in the fall of 2001. (187). Until May 2002, the only contact between them was through online instant messaging. (187). Late one Sunday night in May 2002, Petitioner came over to see the victim and Petitioner said he wanted to get back together. The victim did not wish to do so, and described it as "a long, frustrating talk." (188-189). The night of Thursday, May 17, 2002, Petitioner went to the victim's house and they watched a movie. During the movie, Petitioner started talking about killing himself. He cried and said that he was going to call the victim's dad and tell him horrible things and do other things to try to get her to be close to him. The victim told Petitioner that "he had to leave because it was scary." (192). Petitioner refused to leave and continued saying mean things to the victim. (193).

Petitioner then told the victim that if she changed into her pajamas, she would be more comfortable and then he would leave. (193-194). While Petitioner went to the bathroom, the victim went into her basement bedroom to change. (194). Petitioner then came into her room, sat down on the bed, said that he had made his "final decision," and when she asked him what that was, he punched her in the left eye with his fist

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[1] Parenthetical references in this section are to page numbers of volume I of the jury trial transcript. Page references to other volumes of the transcript are prefaced by the applicable roman numeral.

with such force that he knocked her off the bed. She tried to run for the door, but Petitioner jumped on top of her and hit her in the head and slammed her head against a dresser. (196-197). Petitioner then put his hands around her throat and reached his hands down her throat, "like he was trying to reach into my stomach." (197). As he was on top of her, Petitioner threatened to go upstairs and kill her family if she made any sound. Petitioner told the victim that he wanted her to put on her pajamas so it would be easier to have sex with her "one more time" and that he was going to kill himself. (197-198). She tried to get away, but Petitioner continued to hit her so much that she became dizzy and could not see straight. She laid down and Petitioner took off all her clothes and touched her breasts and vaginal area. (198-199). He lamented that she wouldn't date him because he always loved her, called her a "whore" and accused her of sleeping with "every guy at school." (199). Petitioner then penetrated her digitally twice, forced sexual intercourse, and digitally penetrated her again afterwards. (199-201). Petitioner then grabbed a pair of scissors which had been lying on the bed. He held them, but did not do anything with the scissors to the victim. (202). Afterwards, Petitioner repeatedly said he was sorry, and asked her to wait until the morning to tell her parents. (203-204).

A jury found Petitioner guilty but mentally ill of four counts of first degree criminal sexual conduct,[2] one count of second degree criminal sexual conduct,[3] and one count of misdemeanor aggravated domestic violence. He was acquitted

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[2] Contrary to Mich. Comp. Laws § 750.520b.

[3] Contrary to Mich. Comp. Laws § 750.520c.

of a charge of assault with a dangerous weapon alleging a threat with the scissors.

At sentencing, the trial court scored guidelines as required by Mich. Comp. Laws § 769.34.[4] Contrary to Petitioner's statement, the guidelines are not "enhancements" utilized to "increase ... the sentence above the statutory minimum prescribed by Michigan law."[5] Rather, Michigan's sentencing scheme involves two parts to a sentence, a minimum and a maximum. The minimum sentence is calculated using the guidelines and results in a range of months within which the court sets the minimum sentence. Under Michigan's sentencing guidelines, points are scored based on a defendant's prior criminal record ("prior record variables") and based on the facts of the offense ("offense variables"). The resulting points for the prior record variables and the offense variables are then applied to find a specific grid on a table. The grid represents a period of time in months within which the minimum sentence of an indeterminate sentence should fall, absent a departure. Petitioner's grid for the minimum sentence was 108 to 180 months.[6] The court may

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[4] The version of the statute in effect at the time of Petitioner's sentencing is contained in the Appendix and is the version to which reference is made. It has been subsequently amended in a manner not germane to this petition.

[5] Pet. at 6.

[6] First degree criminal sexual conduct is non-probationable. Mich. Comp. Laws § 771.1(1). Although not relevant to Petitioner's claim, for those offenses which are probationable, the guidelines provide that certain grids require an "intermediate sanction" which includes probation, Mich. Comp. Laws § 769.31(b). Depending on the scoring of the guidelines, the grid

depart from the recommended minimum sentence range upward or downward based on substantial and compelling reasons. The maximum sentence is set by statute and the court is required to impose that maximum. Mich. Comp. Laws § 769.8(1). For example, the maximum sentence for second degree criminal sexual conduct is fifteen years. Mich. Comp. Laws § 750.520c(2). For an offense punishable by life in prison, such as first degree criminal sexual conduct, the maximum is a term of years set by the court and is unaffected by the guidelines.

During his sentencing, Petitioner disputed the factual basis for the scoring of the offense variables but did not raise any objection to judicial factfinding or to any other constitutional deficiency to Michigan's sentencing guidelines. On the four counts of first degree criminal sexual conduct, the trial court sentenced Petitioner to four concurrent terms in the Michigan Department of Corrections for a minimum, within the applicable guidelines grid, of twelve years (144 months) to a maximum of thirty years. Pet. App. at 46-47. Petitioner was also sentenced to a minimum term of ten years to a maximum of fifteen years on the conviction for second degree criminal sexual conduct.[7] *Id.*

During the pendency of Petitioner's appeal to the Michigan Court of Appeals, Petitioner filed a motion pursuant to Mich. Ct. R. 7.211(C) seeking a remand to the trial court to conduct an evidentiary hearing regarding Petitioner's

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may be a cell for which a sentence can either be an intermediate sanction or an indeterminate prison sentence. Mich. Comp. Laws § 769.34(4)(d).

[7] Under Michigan law, no guidelines were scored for the lesser second degree criminal sexual conduct conviction.

allegations of ineffective assistance of counsel. By order dated September 1, 2004, the Court of Appeals denied Petitioner's motion for "failure to persuade the Court of the necessity of a remand at this time." *See* App. at 2b. From that order, Petitioner filed a timely application for leave to appeal with the Michigan Supreme Court. On May 31, 2005, the Michigan Supreme Court denied Petitioner's application. *See People v. Haskell*, 472 Mich. 913; 697 N.W.2d 152 (2005); App. at 1b. Petitioner never sought further review of that issue.

The Court of Appeals subsequently affirmed Petitioner's conviction and sentence in an unpublished opinion. Pet. App. at 1-16. The Michigan Supreme Court denied Petitioner's application for leave to appeal. *People v. Haskell*, 474 Mich. 1118; 712 N.W.2d 448 (2006); Pet. App. at 17.

REASONS FOR DENYING THE PETITION

I. Petitioner was not subjected to a longer sentence based on his claim of innocence at sentencing. Petitioner conceded he showed no remorse and never claimed that an assertion of innocence cannot, as a matter of law, be considered as evidence of a lack of remorse.

Petitioner frames the question presented very specifically: can a court consider a defendant's expression of innocence as evidence of a lack of remorse. Petitioner, however, failed to present that question to the intermediate state court of appeals or the state supreme court. In the lower courts, Petitioner always framed the question as whether the trial court had improperly held out the *quid pro quo* of a lower sentence in exchange for a confession of guilt as prohibited by Michigan law. *See* Defendant/Appellant's Brief to the Michigan Court of Appeals at 10. Accordingly, the question presented is

unpreserved. Petitioner's failure to preserve the question has deprived this Court of a close factual examination of the sentencing proceeding by the lower courts to determine whether the only evidence that existed to support the trial court's finding of a lack of remorse was Petitioner's claim of innocence, and if so, whether such a procedure would be a violation of Petitioner's state or federal constitutional protections.

Petitioner's allocution to the court was unequivocal in his assertion of innocence, with no reference to his mental illness or the injuries suffered by the victim, as he referenced Plato and commented that truth and justice do not exist on Earth. Pet. App. at 39. The court asked no questions of Petitioner and made no initial comment about Petitioner's allocution. Instead, the trial court heard argument from the attorneys over Petitioner's motion to vacate some of the convictions. Pet. App. at 39-41. Only later, the trial court observed, "Now you may protest your, your innocence but that's a fact that unless a higher Court sets aside this verdict somehow, it's something that somehow you are going to have to accept." Pet. App. at 42. When the court went on to tell Petitioner, "It's about you raping her," Petitioner volunteered, almost defiantly, "No it's not." Petitioner's counsel explained Petitioner's attitude, clarifying at length that because of his mental illness Petitioner did not believe himself capable of the acts of sexual violence of which he was convicted. Pet. App. at 43-46.

The trial court expressed its concern over the absolute lack of remorse in this case.[8] During trial, Petitioner argued that

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[8] Even the probation officer commented on Petitioner's lack of remorse in the presentence report: "...while he stated he felt

"[i]t was a domestic violence, domestic assault." (Tr. III at 233). At sentencing, Petitioner's counsel even acknowledged that Petitioner had seen that the victim was physically assaulted and that he had "obviously" known what he did to the victim and that Petitioner could not deny the physical assault. Pet. App. at 45. In the context of his claim of innocence, Petitioner demonstrated a lack of remorse by his complete failure to even acknowledge his mental condition as a mitigating factor or that the victim was even harmed. Instead of expressing some remorse for his victim and her plight, from Petitioner there was only defiance. In fact, in Petitioner's appeal to the state court of appeals, Petitioner conceded that he expressed no remorse. *See* Defendant/Appellant's Brief to the Michigan Court of Appeals at 11.

Although Petitioner maintained his innocence, at no time did the court try to get Petitioner to admit his guilt. In fact, the court did not direct any questions whatsoever at Petitioner, much less attempt to try to get him to confess. There was no argument by the court or even an invitation by the court for a response. Instead, Petitioner *interrupted* the court while it was articulating its analysis of its sentencing considerations. Even after being interrupted, the court did not engage Petitioner or seek a response or a confession.

Furthermore, the court did not suggest in any way that the sentence would have been less if Petitioner *had* confessed. Petitioner claims that the court suggested it would impose a lower sentence if Petitioner confessed based on the trial court's reference to a possible lesser sentence under an earlier

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remorse, no true remorse was displayed." Presentence Report at 2 (Evaluation and Plan).

plea agreement. Taken in context, the comment does not suggest a *quid pro quo* of a lower sentence in exchange for a confession, but rather reflects the trial court's obvious concern at the prospect of sentencing a young man to such a lengthy prison term. Pet. App. at 41-43.

In this case, Petitioner is attempting to convert a common and fact-intensive inquiry into a broad legal question worthy of certiorari by suggesting that the Michigan courts are applying a novel and unconstitutional standard. Michigan's standard is well-settled. Resentencing is required where a trial court considers the defendant's failure to admit guilt. *People v. Conley*, 270 Mich. App. 301, 314; 715 N.W.2d 377 (2006). In order to determine whether a trial court has sentenced a defendant based on his claim of innocence, appellate courts review three factors: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v. Wesley*, 428 Mich. 708, 713; 411 N.W.2d 159 (1987).[9] But, lack of remorse is clearly an appropriate consideration for sentencing. *Id.* at 711. When presented with the opportunity to directly review *Wesley*, this Court denied the petition for certiorari. *Wesley v. Michigan*, 484 U.S. 967; 108 S.Ct. 459; 98 L.Ed.2d 399 (1987).

Contrary to Petitioner's claim, the Michigan standard is consistent with how other courts treat a claim of innocence at

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[9] Although this test was articulated in a plurality opinion, it has been followed by the intermediate court of appeals. *See, e.g., People v. Calabro*, 166 Mich. App. 389, 394-395; 419 N.W.2d 791 (1988).

sentencing. The "flat out split among the courts in this country" claimed by Petitioner simply does not exist. The cases cited by Petitioner illustrate this point. In *United States v. Wright*, 533 F.2d 214 (5th Cir. 1976), the court of appeals vacated a sentence based on comments by the trial judge that established that the defendant was being punished for having a trial. Nothing in that case involved whether a claim of innocence was used as evidence of a lack of remorse. In *United States v. Roe*, 670 F.2d 956 (11th Cir. 1982), while nothing in that case addressed a claim of innocence being considered as evidence of a lack of remorse, the statement quoted by Petitioner from that case,[10] "that a '[s]entencing court may not present the defendant with a choice between admitting his guilt and enduring a harsher sentence for failing to do so,'" is an accurate restatement of Michigan law. In *United States v. Laca*, 499 F.2d 922 (5th Cir. 1974), the trial court imposed a greater sentence because the defendants failed to confess. Again, nothing in the opinion discusses a lack of remorse. Citing *Geraci v. Senkowski*, 211 F.3d 6 (2d Cir. 2000), Petitioner suggests that the Second Circuit differs from Michigan. Yet the lower court, which was affirmed by the Second Circuit, explicitly stated, "A sentencing judge may properly consider a defendant's remorse, or lack thereof, in determining a defendant's sentence. Doing so does not infringe a defendant's Fifth Amendment rights." *Geraci v. Senkowski*, 23 F. Supp.2d 246, 266-268 (E.D.N.Y. 1998). Again, this is a simple restatement of the same standard followed in Michigan.

Even the opinion of the Montana Supreme Court, cited by Petitioner as evidence of a conflict among the lower courts, does not go as far as Petitioner asserts. In *State v. Imlay*, 249

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[10] Pet. at 8-9.

Mont. 82; 813 P.2d 979 (1991), the Montana Supreme Court held that it was improper to revoke a defendant's suspended sentence based solely on a refusal to admit guilt. Remorse, or the lack thereof, was not an issue in that case. In fact, Montana acknowledged Michigan's standard in *State v. Shreves*, 313 Mont. 262; 60 P.3d 991 (2002), that "a court may consider lack of remorse as basis for a sentence, but may not punish a defendant for refusing to admit guilt." *Id.* at 260, citing *Wesley*. Acknowledging that it was difficult to distinguish between punishing a defendant for remaining silent and failing to show remorse, the Montana Supreme Court concluded it was unable to make such a distinction in the case before it. *Id.* Accordingly, the court held as a matter of both federal and *state* constitutional law, that a sentencing court could not draw an inference of a lack of remorse from a defendant's silence at sentencing where he has maintained innocence. *Id.* at 260-261. That Montana has chosen, as a matter of construing its own state constitution, to construe the state protection against self incrimination broader than other states and federal courts construing the Fifth Amendment does not create a conflict making the issue worthy of certiorari.

In an attempt to create a conflict where none exists, Petitioner claims that Michigan permits a court to enhance a sentence based on a defendant's claim of innocence as the Ninth Circuit apparently does, citing *Williams v. Stewart*, 441 F.3d 1030 (9th Cir. 2006). But Michigan law permits no such thing. To the extent that the Ninth Circuit may do so, if the Court wishes to address the issue, then perhaps the Court might grant the petition in *that* case. *See Williams v. Stewart*, No. 06-6249 (petition for certiorari filed August 28, 2006). Even if the Ninth Circuit permits consideration of a claim of innocence at sentencing, that presents no reason to review Michigan's stricter standard.

Almost uni[illegible]ly, courts are precluded from enhancing a sentence based on a defendant's claim of innocence and Michigan's rule is consistent with that principle. But a defendant's lack of remorse is a proper sentencing factor and is directly related to a defendant's capacity for rehabilitation.[11] While there sometimes can be a fine line between taking into account a lack of remorse and punishing a defendant for claiming innocence, the trial court did not cross that line here. *See, e.g., State v. Kamana'o*, 103 Hawaii 315, 321; 82 P.3d 401 (2003)(there is a "subtle, yet meaningful, distinction between imposing a harsher sentence upon a defendant based on his or her lack of remorse, on the one hand, and punishing a defendant for his or her refusal to admit guilt, on the other.") In this case, the state court followed a common rule of law. At best, Petitioner can only claim a misapplication of a properly stated rule of law. In any event, Petitioner's case is fact intensive, unremarkable, and fails to present the issue that Petitioner now seeks to assert for the first time.

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[11] Although the trial court in this case never specifically articulated its concern that the lack of remorse reflected poorly on Petitioner's potential for rehabilitation, the connection is a common sense one, well-known among the legal community, especially for sex offenders. *See, e.g. McKune v. Lile*, 536 U.S. 24, 32-34; 122 S.Ct. 2017; 153 L.Ed.2d 47 (2002)(acceptance of responsibility is an important component of rehabilitation and reducing recidivism); *Wesley*, 428 Mich. at 715-716.

II. The phrase "continuing pattern of criminal behavior" is a term defined by the Michigan Legislature. While Petitioner claimed at sentencing that the statutory definition had not been satisfied, Petitioner never challenged at any stage of this proceeding that the statute violates due process. Because the guideline variable was scored for conduct resulting in convictions, Petitioner fails to state a claim under *Blakely v Washington*.

For the first time, Petitioner claims that Mich. Comp. Laws § 777.43 violates due process.[12] At the time of Petitioner's crime, the statute provided:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual

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[12] Petitioner suggests in a footnote that this could also present a violation of the multiple punishment prong of the double jeopardy clause. Pet. at 14. But the double jeopardy clause does not act as a restraint on the legislature from permitting the separate punishment for multiple acts in the same transaction. *Ohio v. Johnson*, 467 U.S. 493, 499; 104 S.Ct. 2536; 81 L.Ed.2d 425 (1984). In this case, Petitioner sexually penetrated the victim twice digitally, forced sexual intercourse, and then digitally penetrated her again afterwards. (199-201). Each of these four penetrations resulted in a separate conviction as permitted by Michigan law. *People v. Dowdy*, 148 Mich. App. 517, 521; 384 N.W.2d 820 (1986).

penetrations against a person or persons less than 13 years of age. 50 points

(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. 25 points

(c) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property. 10 points

(d) The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. 10 points

(e) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. 5 points

(f) No pattern of felonious criminal activity existed. 0 points

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably

inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.

(d) Score 50 points only if the sentencing offense is first degree criminal sexual conduct.

At sentencing, Petitioner objected to the scoring of offense variable thirteen. His objection was specific: "I believe there is no pattern of felonious, criminal activities. I believe that there was only the two acts, not the three acts, one being the Criminal Sexual Conduct and the other act being the Domestic Violence. Therefore I would object to the scoring of that at twenty-five." Pet. App. at 28. In response, the prosecutor pointed out that Petitioner was convicted of four separate criminal sexual penetrations. Pet. App. at 28-29. No objection was made that the variable was so arbitrary or rare that it violated due process nor that the scoring of the variable improperly deprived Petitioner of his right to a jury determination of the issue. In addition, no such objection was made in Petitioner's appeal to the intermediate court of appeals or the Michigan Supreme Court. The only issue raised regarding offense variable thirteen on appeal was that the trial court had committed an error in its construction of the Michigan statute. *See* Defendant/Appellant's Brief to the Michigan Court of Appeals at 13-16; Defendant/Appellant's Corrected Application for Leave to Appeal to the Michigan Supreme Court at 8-9. No due process violation or error under *Blakely v. Washington*, 542 U.S. 296; 124 S.Ct. 2531; 159 L.Ed.2d 403 (2004) was alleged. Accordingly, those claims are unpreserved.

Petitioner claims this unpreserved objection is worthy of certiorari based on a conflict among the courts as to what constitutes a "continuing pattern of criminal activity." Pet. at 13. But Petitioner fails to appreciate that the term is a defined one under state law. While subsection 1 describes the variable as "continuing pattern of criminal behavior," subsection 2 requires that "all crimes within a 5-year period, including the sentencing offense, shall be counted." As construed by the Michigan Supreme Court, the phrase is a defined term. *People v. Francisco*, 474 Mich. 82, 87; 711 N.W.2d 44 (2006)("MCL 777.43(2)(a) defines a "pattern" as three or more crimes committed "within a five-year period, including the sentencing offense....") Petitioner, however, confuses this defined term under Michigan law with the undefined one open to judicial construction used in other jurisdictions. Petitioner does nothing to demonstrate that the Michigan statute offends due process other than say so.

Finally, in an attempt to implicate *Blakely*, Petitioner claims a violation of the Sixth Amendment arising from the supposed lack of a jury determination as to whether there was a continuing pattern of criminal activity. Aside from the inapplicability of *Blakely* to Michigan's scheme of indeterminate sentencing,[13] as well as the complete lack of any preservation of the issue in the courts below, Petitioner enjoyed a jury determination as to whether he had committed three or more crimes against a person. In this case, the jury found Petitioner guilty of four separate counts of first degree criminal sexual conduct on which the scoring of offense variable thirteen was based.

Petitioner has failed to demonstrate that the choice of the

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[13] As discussed *infra*, part III.

Michigan Legislature in its definition of a continuing pattern of criminal behavior violates due process. The issue is not worthy of certiorari.

III. Because the guidelines have no impact on the statutory maximum sentence, Michigan's scheme of indeterminate sentencing does not violate *Blakely v. Washington*. In any event, Petitioner submitted to judicial factfinding.

Petitioner displays a fundamental misunderstanding of Michigan's indeterminate sentencing scheme. Contrary to Petitioner's claim,[14] the legislature does *not* prescribe a minimum sentence which is then increased based on judicially found facts. To the contrary, a sentence in Michigan includes both a minimum and maximum term. The maximum sentence is set by statute and the court is *required* to impose that maximum. Mich. Comp. Laws § 769.8(1).[15] In cases where the crime is punishable by life imprisonment, which includes

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[14] Pet. at 16, 20.

[15] The statute provides: "When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence."

first degree criminal sexual conduct,[16] the court has complete discretion over the maximum sentence:

> In all cases where the maximum sentence in the discretion of the court may be ir prisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

Mich. Comp. Laws § 769.9(2).[17] The minimum, however, is set by the court and must be within a sentence range prescribed by the sentencing guidelines. Mich. Comp. Laws § 769.34(2).[18] But the minimum sentence does not mean that

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[16] Mich. Comp. Laws § 750.520b(2)("Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or any term of years.")

[17] There appear to be *no* Michigan cases challenging the maximum of an indeterminate sentence. Accordingly, not only are the guidelines irrelevant to the maximum sentence as a matter of law, as a matter of practice, the trial court's discretion in choosing a maximum sentence is virtually unreviewable.

[18] While Mich. Comp. Laws § 769.34(2)(b) provides that the longest a minimum sentence may be is two-thirds of the maximum ("The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."),

a prisoner is released once that minimum is served. It only means that a prisoner is eligible for consideration by the parole board for release. *See* Mich. Comp. Laws § 791.232 *et seq*. But thousands of prisoners serve sentences well beyond their minimums and many serve their maximum sentences.[19]

As a preliminary matter, Petitioner failed to preserve this claim at sentencing. At sentencing, Petitioner objected to the scoring of four offense variables. Although *Blakely* had not been decided at the time of his sentencing, at no time did Petitioner claim, as a basis for his objections, that it was improper to score the guidelines based on judicial findings of fact. To the contrary, Petitioner submitted himself to judicial factfinding and was an active participant in the process. Pet. App. at 24-29. By his conduct, Petitioner consented to judicial factfinding.[20] Petitioner has thus waived any *Blakely* claim. Accordingly, there is no error to review. *United States v. Olano*, 507 U.S. 725, 732-733; 113 S.Ct. 1770;

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that restriction does not apply to life offenses. *People v. Powe*, 469 Mich. 1032; 679 N.W.2d 67 (2004). Petitioner was convicted of four life offenses.

[19] According to the Michigan Department of Corrections Office of Research and Planning, in 2005, 15.8% of prisoners released were discharged on their maximum sentence. Of the total prisoner population in 2005, 34.4% were serving sentences beyond their earliest release date and of that group, 76% had not been paroled (the remaining 24% were parolees returned to prison as violators).

[20] *Blakely*, 542 U.S. at 310 (States may continue judicial factfinding if defendant consents).

123 L.Ed.2d 508 (1993)("Deviation from a legal rule is error unless the rule has been waived.").

Aside from Petitioner's waiver of any apparent *Blakely* protections, this Court's statements in *Blakely* make it clear that it does not apply to indeterminate sentencing schemes:

> Indeterminate sentencing does not [infringe on the province of the jury]. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence-and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 309. In this case, every rapist in Michigan who commits first degree criminal sexual conduct knows he is risking the rest of his life in prison. Petitioner's jury made all the findings necessary for a sentencing court to impose a maximum sentence of *any* term of years. While the application of the sentencing guidelines sets the minimum

sentence a defendant must serve before the parole board can consider whether to grant parole or not under Mich. Comp. Law § 791.234(1),[21] that minimum sentence does not dictate when a defendant will be released. Unlike the Washington scheme of determinate sentencing in *Blakely*, release in Michigan occurs only through the parole board, unconstrained by *Blakely*, or upon the expiration of the maximum sentence. *See People v. Drohan*, 475 Mich. 140; 715 N.W.2d 778 (2006)(holding that *Blakely* does not apply to Michigan's scheme of indeterminate sentencing), *petition for certiorari filed*, September 6, 2006, No. 06-6493. *See also People v. McCuller*, 475 Mich. 176; 715 N.W.2d 798 (2006), *petition for certiorari filed*, September 11, 2006, No. 06-6468.

Michigan's sentencing guidelines are more analogous to the scheme approved by this Court in *McMillan v Pennsylvania*, 477 U.S. 79; 106 S.Ct. 2411; 91 L.Ed.2d 67 (1986). In *McMillan*, Pennsylvania provided that a mandatory minimum sentence of five years must be imposed if the sentencing judge found during sentencing that a firearm was visibly possessed during the commission of the offense. The maximum term of the indeterminate sentence, however, was not increased. *Id.* at 81-83. This Court affirmed the statutory scheme finding that "[i]t simply took one factor that has always been considered by sentencing courts to bear on punishment ... and dictated the precise weight to be given that factor." *Id.* at 89-90. In *Blakely*, this Court explicitly distinguished *McMillan* observing that it "involved a sentencing scheme that imposed a statutory *minimum* if a

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[21] Decisions *not* to grant parole are unreviewable. *Morales v. Michigan Parole Board*, 260 Mich. App. 29, 35-36; 676 N.W.2d 221 (2004); Mich. Comp. Laws § 791.234; Mich. Ct. R. 7.104(D).

judge found a particular fact." *Blakely*, 542 U.S. at 304 (emphasis in original). Unlike *Blakely*, the Pennsylvania scheme did "not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.*, citing *McMillan*. This is no different than what Michigan does with its sentencing guidelines. The guidelines simply take factors arising from the facts of the offense, a traditional sentencing consideration, and assigns a certain weight to be given those factors.[22] In fact, the guidelines are not even the *exclusive* factors for the court to consider in determining the minimum term of an indeterminate sentence. If the sentencing court finds that certain factors are not covered by the guidelines, or are given inadequate weight, so long as those factors are objective and verifiable, the sentencing court is free to depart upwards or downwards. Mich. Comp. Laws § 769.34(3)(b); *People v. Babcock*, 469 Mich. 247; 271-274; 666 N.W.2d 231 (2003)(appendix prepared by Michigan Supreme Court to

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[22] The following offense variables are required by Mich. Comp. Laws § 777.22(1) to be scored for first degree criminal sexual conduct: aggravated use of a weapon, Mich. Comp. Laws § 777.31; lethal potential of weapon possessed or used, Mich. Comp. Laws § 777.32; degree of physical injury to a person, Mich. Comp. Laws § 777.33; degree of psychological injury to a victim, Mich. Comp. Laws § 777.34; aggravated physical abuse, Mich. Comp. Laws § 777.37; victim asportation or captivity, Mich. Comp. Laws § 777.38; number of victims, Mich. Comp. Laws § 777.39; exploitation of a vulnerable victim, Mich. Comp. Laws § 777.40; criminal sexual penetration, Mich. Comp. Laws § 777.41; contemporaneous felonious criminal acts, Mich. Comp. Laws § 777.42; continuing pattern of criminal behavior, Mich. Comp. Laws § 777.43; offender's role, Mich. Comp. Laws § 777.44; threat to security or interference with the administration of justice, Mich. Comp. Laws § 777.49; and terrorism, Mich. Comp. Laws § 777.49a.

assist the bench and bar in carrying out their responsibilities under Michigan's sentencing guidelines).

As part of his *Blakely* challenge, Petitioner suggests that the error in Michigan's system is that the trial court was permitted to score the guidelines in apparent disregard of Petitioner's acquittal for assault with a dangerous weapon. But Petitioner does not challenge or question this Court's decision in *United States v Watts*, 519 U.S. 148; 117 S.Ct. 633; 136 L.Ed.2d 554 (1997) that a sentencing court may consider conduct for which a defendant has been acquitted. In any event, assuming a lack of merit to any *Blakely* challenge, Petitioner's acquittal of *using* a weapon to assault the victim[23] was not a finding that Petitioner did not *possess* a weapon. Under the guidelines, points could be scored where Petitioner simply "*possessed* ... a ... cutting or stabbing weapon." Mich. Comp. Laws § 777.32(1)(emphasis added). A conviction under the statute requires actual use of a weapon to threaten someone; scoring under the guidelines is sufficient if there is mere possession of a weapon.

Finally, in an attempt to make this case appear worthy of certiorari, Petitioner claims a conflict among the lower courts reviewing sentencing systems he claims are like Michigan's.[24] But none of those states have sentencing systems like Michigan. Six of the seven States cited by Petitioner[25] involve *determinate* sentencing schemes that differ dramatically from the Michigan scheme of indeterminate sentencing. *State v. Brown*, 209 Ariz. 200; 99 P.3d 15, 18 (2004)(defendant given

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[23] Contrary to Mich. Comp. Laws § 750.82(1).

[24] Pet. at 19.

[25] Pet. at 19.

a determinate sentence); *Lopez v. State*, 113 P.3d 713, 723-725 (Colo. 2005)(determinate sentencing scheme in Colorado was not invalidated by *Blakely* because court can only aggravate a sentence based on facts found by a jury, facts admitted by a defendant, facts found after defendant consents to judicial factfinding, or facts regarding prior convictions); *Smylie v. State*, 823 N.E.2d 679, 682-685 (Ind. 2005)(departure from fixed presumptive sentence based on judicial factfinding violates *Blakely*); *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005)(determinate sentencing scheme violates *Blakely* where departures from presumptive sentence permitted based on judicial factfinding); *State v. Natale*, 184 N.J. 458, 483-484; 878 A.2d 724 (2005)(departing from fixed presumptive sentence based on judicial factfinding violates *Blakely*); *State v. Dilts*, 337 Or. 645, 649-652; 103 P.3d 95, 99 (2004)(upward departure from determinate sentence violates *Blakely*). While the seventh state, North Carolina, provides for indeterminate sentencing, both the minimum *and* maximum sentence is determined by judicial factfinding pursuant to the North Carolina guidelines, N.C. Gen. Stat. 15A-1340.17 (d),(e)(2003). *State v. Allen*, 359 N.C. 425; 615 S.E.2d 256, 264-265 (2005)(increase over presumptive minimum and maximum sentence based on judicial factfinding violates *Blakely*). Unlike North Carolina, in Michigan the maximum sentence is unaffected by the guidelines.

Petitioner further identifies three States which he claims permit judicial factfinding and thus create a conflict that this Court must resolve. But none of those schemes are similar to Michigan's indeterminate sentencing system. While California has adopted a determinate sentencing system, it claims that it does not violate *Blakely*. *People v Black*, 35 Cal.4th 1238; 113 P.3d 534 (2005). That issue, however, is the subject of *Cunningham v California*, No. 05-6551, *certiorari granted*, 126 S.Ct. 1329 (2006). Even Petitioner

concedes that *Cunningham* has no impact on whether Michigan's indeterminate sentencing scheme violates *Blakely*. Pet. at 20. Nor do the sentencing systems in the two other States identified by Petitioner bear any relationship to Michigan's system. In *State v Maugaotega*, 107 Hawaii 399, 407-410; 114 P.3d 905 (2005), the Supreme Court of Hawaii rejected a challenge to a sentence under Hawaii's sentencing structure based on *Blakely* because its guidelines were not mandatory.[26] In *State v Gomez*, 163 S.W.3d 632 (Tenn. 2005), the Tennessee Supreme Court found that Tennessee's determinate sentencing scheme does not violate *Blakely* despite the fact that an increase in a presumptive sentence can be based on judicial factfinding. But that finding does nothing to call into question Michigan's indeterminate sentencing system, nor does it create any conflict over how Michigan's sentencing guidelines operate. To the extent *Gomez* raises questions under *Blakely*, then this Court can consider those questions in the context of *that* case. *Gomez v. Tennessee*, No. 05-296 (petition for certiorari filed August 15, 2005).

Given Petitioner's submission to judicial factfinding and *Blakely*'s recognition that indeterminate sentencing schemes do not violate the Sixth Amendment right to jury trial, the petition should be denied.

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[26] Judicial findings of non-binding, advisory enhancement facts do not violate *Blakely*. *United States v. Booker*, 543 U.S. 220, 245-246; 125 S.Ct. 738; 160 L.Ed. 621 (2005)(federal sentencing guidelines rendered advisory to comply with *Blakely*).

IV. Petitioner fails to allege or demonstrate how Michigan's standard for requiring an evidentiary hearing on an ineffective assistance of counsel challenge is the subject of dispute among the lower courts or violates the Constitution.

While his appeal was pending in the Michigan Court of Appeals, Petitioner filed a motion to remand to the trial court to conduct an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel. The court of appeals denied the motion, finding that Petitioner had failed to persuade the court of a necessity of a remand at that time as required by Mich. Ct. R. 7.211(C)(a).[27] App at 2b. Petitioner then sought interlocutory review by the Michigan Supreme Court which was denied. App. at 1b. After the Michigan Court of Appeals issued its opinion, Petitioner then sought review by the Michigan Supreme Court. But nowhere in his application to that court did Petitioner ever allege any error by the court of appeals in denying his motion to remand to conduct an evidentiary hearing. Accordingly, Petitioner's claim is not preserved for review by this Court.

Michigan requires that an evidentiary hearing on an allegation of ineffective assistance be conducted whenever there is a factual dispute. *People v. Ginther*, 390 Mich. 436;

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[27] Mich. Ct. R. 7.211(C)(1)(a)(ii) provides: "Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show: (i) that the issue is one that is of record and that must be initially decided by the trial court; or (ii) that development of a factual record is required for appellate consideration of the issue. A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing."

212 N.W.2d 922 (1973).[28] Contrary to his claim, Petitioner presents no cases which suggest or illustrate "significant confusion" in the lower courts regarding the legal standard which must be satisfied to trigger an evidentiary hearing. Petitioner further fails to allege, much less demonstrate, that the standard followed by Michigan differs from any other jurisdiction, how that standard violates the Constitution, or what standard should have been applied. The court of appeals found that even assuming Petitioner's factual allegations to be true he failed to demonstrate prejudice as required by *Strickland v Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). Accordingly, the court properly refused to require an evidentiary hearing to be held. At best, Petitioner can only claim a misapplication of a properly stated rule of law. Certiorari is not warranted.

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[28]The standard can best be analogized to the central question under Fed. R. Civ P. 56(c): whether there is a genuine issue of material fact.

RELIEF REQUESTED

For the foregoing reasons, the People of the State of Michigan request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX 1

SUPREME COURT OF MICHIGAN

SC: 127184

[Filed May 31, 2005]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

CRAIG MICHAEL HASKELL,
Defendant-Appellant.

On Appeal From
COA: 251929
Livingston CC: 02-013073

OPINION

On order of the Court, the application for leave to appeal the September 1, 2004 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX 2

COURT OF APPEALS, STATE OF MICHIGAN

Docket No. 251929

[Filed September 1, 2004]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

CRAIG MICHAEL HASKELL,
Defendant-Appellant.

Janet T. Neff, Presiding Judge
Jane E. Markey, Michael R. Smolenski, Judges

ORDER

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1)(a) is DENIED for the failure to persuade the Court of the necessity of a remand at this time.

/s/_____
Presiding Judge

APPENDIX 3

RELEVANT STATUTORY PROVISION INVOLVED

Michigan Compiled Laws § 769.34 (2002)

(1) The sentencing guidelines promulgated by order of the Michigan supreme court shall not apply to felonies enumerated in part 2 of chapter XVII committed on or after January 1, 1999.

(2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. Both of the following apply to minimum sentences under this subsection:

> (a) If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a

departure under this section. If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.

(b) The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.

(3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

(b) If the offense is a violation of section 7401(2)(a)(iv) or 7403(2)(a)(iv) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and the upper limit of the recommended minimum sentence range is 18 months or less, the court shall impose a sentence of life probation absent a departure.

(c) If an attempt to commit a felony designated in offense class H in part 2 of this chapter is punishable by imprisonment for more than 1 year, the court shall impose an intermediate sanction upon conviction of that offense absent a departure.

(d) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:

(i) To imprisonment with a minimum term within that range.

(ii) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

(5) If a crime has a mandatory determinant penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime.

(6) As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

(7) If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

(8) All of the following shall be part of the record filed for an appeal of a sentence under this section:

(a) An entire record of the sentencing proceedings.

(b) The presentence investigation report. Any portion of the presentence investigation report exempt from disclosure by law shall not be a public record.

(c) Any other reports or documents the sentencing court used in imposing sentence.

(9) An appeal of a sentence under this section does not stay execution of the sentence.

(10) If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

(11) If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

(12) Time served on the sentence appealed under this section is considered time served on any sentence imposed after remand.

Supreme Court, U.S.
FILED
OCT 2 - 2006
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No. 06-137

In The Supreme Court of the United States

CRAIG MICHAEL HASKELL,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Michigan

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TABLE OF CONTENTS

Page

Table of Authorities iii

Introduction 1

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION FOR A COURT TO IMPOSE A GREATER SENTENCE BECAUSE A DEFENDANT EXPRESSES HIS INNOCENCE AT THE SENTENCING PHASE 1

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A SPLIT AMONG THE LOWER COURTS AS TO WHETHER DUE PROCESS OR THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY IS VIOLATED IF A "CONTINUING PATTERN OF CRIMINAL ACTIVITY" IS FOUND BASED ON ONE INCIDENT 4

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE COURTS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES THE SIXTH AMENDMENT RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT FOR A TRIAL JUDGE TO INCREASE A SENTENCE BY FINDING FACTS THAT DIRECTLY CONTRAVENE THE JURY'S VERDICT 6

TABLE OF CONTENTS – Continued

Page

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A CONFLICT AMONG THE LOWER COURTS AS TO WHEN THERE MUST BE A HEARING TO DETERMINE IF THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL 8

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 6, 7

Bearden v. Georgia, 461 U.S. 660 (1983) 4

Blakely v. Washington, 542 U.S. 961 (2004) 5, 6, 7

Goldsby v. United States, 152 Fed.Appx. 431 (6th Cir. 2005) 9

Gomez-Diaz v. United States, 433 F.3d 788 (11th Cir. 2005) 9

Isaac v. State, 911 So.2d 813 (Fla. 2005) 5

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 7

Mitchell v. United States, 526 U.S. 314 (1999) 3

People v. Felder, 129 P.3d 1072 (Colo.App. 2005) 5

People v. Ginther, 390 Mich. 436, 212 N.W.2d 922 (1973) 9

State v. Imlay, 249 Mont. 82 (1991) 3

State v. Perez, 196 Ore.App. 364, 102 P.3d 705 (Ore.App. 2004), *rev'd on other grounds,* 340 Ore. 310, 131 P.3d 168 (Ore. 2006) 5

State v. Rivers, 130 Wash.App. 689, 128 P.3d 608 (Wash.App. 2005) 5

Sun Savings & Loan Association v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) 5

United States v. Booker, 543 U.S. 220 (2005) .....

United States v. Davis, 159 Fed.Appx. 814 (9th Cir. 2005) 9

United States v. Ford, 840 F.2d 460 (7th Cir. 1988) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. Grande, 353 F.Supp.2d 623 (E.D. Va. 2005) 4

United States v. Graham, 2006 WL 1196250 (10th Cir. 2006) 9

United States v. Harris, 536 U.S. 545 (1982) 7

United States v. Laca, 499 F.2d 28 (5th Cir. 1974) 3

United States v. McClain, 2 F.3d 205 (7th Cir. 1993) 3

United States v. Walters, 163 Fed.Appx. 164 (10th Cir. 2006) 9

United States v. Wright, 533 F.2d 214 (5th Cir. 1976) 3

Williams v. Stewart, 2 F.3d 205 (7th Cir. 1993) 3

Wilson v. Florida, 776 So.2d 347 (Fla. 2001) 4

STATUTES

MCL 777.32 6

INTRODUCTION

Contrary to the State's assertion, each of the issues presented in the petition for a writ of certiorari was expressly raised in the Michigan state courts and is properly before this Court. Each presents an issue of national importance on which the Circuits and states are split.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION FOR A COURT TO IMPOSE A GREATER SENTENCE BECAUSE A DEFENDANT EXPRESSES HIS INNOCENCE AT THE SENTENCING PHASE.

Craig Haskell has claimed from the time of his arrest to this day that he is innocent and that no sexual assault ever occurred. It must be remembered that this is a case where there was no physical evidence of rape, where the victim did not mention rape when she first spoke to the police, and where the victim told hospital personnel that no rape occurred. App. at 13; (Tr. II, 16-17, 21, 47). The only evidence of rape was the victim's assertions at trial. At the sentencing proceeding, Haskell declared his innocence. He stated: "I know that one day the truth will come out and I stand before you an innocent man." Appendix to Petition for a Writ of Certiorari ("App.") at 39.

The State, of course, does not deny that the trial judge responded to this by imposing a greater sentence on Haskell because of his failure to show remorse. The trial judge stated: "I don't see any remorse in this case. None. . . . And it's bothersome to me. . . . The only question I have is how much above the minimum I should go." App. at 43. The judge then said, "I don't see a thread or thimble of remorse or reaching out to the victim in this case and

saying I'm sorry for what you have been put through." App. at 44.

The State says that Michigan law does not allow greater punishment to be imposed on a person for expressing innocence, Brief in Opposition ("Br. Opp.") at 8, but that Michigan law permits punishment for lack of remorse. *Id.* at 11. But this is a distinction without a difference. In this instance, the sole evidence of lack of remorse was Haskell's continued claim of innocence. As the judge indicated, Haskell would have received a lesser sentence if only he admitted his guilt and apologized to the victim, even though he has steadfastly maintained his innocence. The State says that there is often a "fine line between taking into account a lack of remorse and punishing a defendant for claiming innocence." Br. Opp. at 11. But in this case there was no line at all; a greater sentence was imposed because Haskell claimed his innocence. Under the State's argument there is simply no way for a defendant to express his or her innocence without being punished for failing to show remorse.[1]

Thus, the issue is clearly posed as to whether it violates the privilege against self-incrimination or due process to impose greater punishment on a person simply for claiming to be innocent. The State is wrong in its assertion that Haskell failed to preserve this issue. Br. Opp. at 6. For example, in the Michigan Court of Appeals, the first heading in Haskell's brief on appeal was:

> I. Craig Haskell maintained his innocence at sentencing in the statements he made to the court. In passing sentence the court repeatedly referred to Haskell's statements and tried to get

[1] The State also argues that the lack of remorse is relevant because it relates to the likelihood of rehabilitation. Br. Opp. at 11 n.11. But this begs the question presented by this case as to whether the Constitution allows a defendant's claim of innocence to be used as the sole basis for a court finding a lack of remorse.

> him to admit guilt. The court violated Haskell's Fifth and Sixth Amendment rights by considering his refusal to admit guilt in its sentence. Further the trial court incorrectly scored the sentencing guidelines. For all of these reasons, Haskell is entitled to a resentencing.

Defendant-Appellant's Brief on Appeal, at 9. The State did not argue in the Michigan Court of Appeals that this issue was waived and the court expressly addressed it, rejecting Haskell's argument. App. at 14-15. Haskell again raised this in his petition for review to the Supreme Court of Michigan. *See* Defendant-Appellant's Corrected Application for Leave to Appeal at 4.

Finally, the issue of whether a defendant can suffer greater punishment for claiming his or her innocence is an issue that constantly arises and that has divided the lower courts. Contrary to the State's assertion, Br. Opp. at 9-10, this is exactly the issue posed by the cases described in the petition for a writ of certiorari. Several courts have held that a defendant may not receive a greater sentence for maintaining his or her innocence. *See, e.g., State v. Imlay*, 249 Mont. 82 (1991); *United States v. Wright,* 533 F.2d 214, 215-16 (5th Cir. 1976); *United States v. Laca*, 499 F.2d 28, 927-28 (5th Cir. 1974). But other courts have held that a defendant may receive a greater sentence for maintaining his or her innocence in that this indicates a lack of remorse. *See, e.g., Williams v. Stewart*, 2 F.3d 205, 207 (7th Cir. 1993); *United States v. McClain*, 2 F.3d 205, 207 (7th Cir. 1993); *United States v. Ford*, 840 F.2d 460, 466-67 (7th Cir. 1988). Each of these cases involved the question of whether greater punishments can be imposed on a defendant for refusing to admit guilt and maintaining his or her innocence. In fact, this Court previously has recognized this as an important issue that it has not yet decided. *See, e.g., Mitchell v. United States*, 526 U.S. 314, 330 (1999) ("The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of

the self-incrimination privilege. Whether silence bears upon the determination of a lack of remorse . . . is a separate question. It is not before us, and we express no view on it.")

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A SPLIT AMONG THE LOWER COURTS AS TO WHETHER DUE PROCESS OR THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY IS VIOLATED IF A "CONTINUING PATTERN OF CRIMINAL ACTIVITY" IS FOUND BASED ON ONE INCIDENT.

The State does not dispute that Haskell received a much longer sentence because the trial judge found a "continuing pattern of criminal activity" based on four alleged sexual contacts that occurred within a few minutes. In fact, the State concedes that Michigan law allows a "a continuing pattern of criminal activity" to be based on all of the crimes, even if they occur within a few minutes. Br. Opp. at 15. In other words, if two people get in a fight and one throws four punches, each could be a separate battery and then the four together could be deemed a "continuing pattern of criminal activity" as the basis for a much longer sentence. That is what happened in this case.

This raises important constitutional questions. Does it violate due process, as patently unfair, to punish a person for a "continuing pattern of criminal activity" when all the events occur within minutes? *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 666 (1983) (due process is violated by procedures that are "fundamentally unfair or arbitrary.") Is the phrase "continuing pattern of criminal activity" unduly vague because courts across the country are split as to whether this can be based on actions that occur at the same time? *Compare United States v. Grande*, 353 F.Supp.2d 623, 633 (E.D. Va. 2005); *Wilson v. Florida*, 776 So.2d 347 (Fla. 2001) (events at the same time cannot be a

basis for finding a continuing pattern of criminal activity); *with Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) (events at the same time can be the basis for finding a continuing pattern of criminal activity).

Moreover, there is a flat out split among the lower courts as to whether a "continuing pattern of criminal activity" must be found by the jury in light of this Court's decision in *Blakely v. Washington*, 542 U.S. 961 (2004). *Compare Isaac v. State*, 911 So.2d 813, 814 (Fla. 2005); *State v. Perez*, 196 Ore.App. 364, 372-73, 102 P.3d 705 (Ore.App. 2004), *rev'd on other grounds,* 340 Ore. 310, 131 P.3d 168 (Ore. 2006) (the jury must find a continuing pattern of criminal activity); *with State v. Rivers,* 130 Wash.App. 689, 128 P.3d 608 (Wash.App. 2005); *People v. Felder*, 129 P.3d 1072 (Colo.App. 2005) (jury need not find continuing pattern of criminal activity in order for the judge to increase the sentence).

The State makes two responses. First, the State argues that the jury found the defendant guilty of four acts of sexual misconduct that occurred within a few minutes. Br. Opp. at 15. Although this is true, the judge imposed a greater punishment than would be based on these four acts by concluding also that they were a "continuing pattern of criminal activity." The jury never was asked whether these four acts, all of which occurred within a few minutes, were a "continuing pattern of criminal activity." Thus, the issue, in part, is whether under *Blakely* it should have been for the jury to decide whether there was a "continuing pattern of criminal activity."

Second, the State argues that this issue was not preserved in the lower courts. Again, this is wrong. Haskell's brief on appeal explained that the trial judge erred "because it would constitute impermissible double counting. Impermissible double counting occurs when precisely the same aspect of the defendant's conduct factors into his sentence in separate ways." Defendant-Appellant's Brief

on Appeal at xxiii. The Michigan Court of Appeals considered the defendant's argument and rejected it. App. at 15-16. The issue is thus preserved and squarely presented as to whether a defendant may be punished for a continuing pattern of criminal activity when all the criminal events occur within a very short time.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE COURTS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES THE SIXTH AMENDMENT RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT FOR A TRIAL JUDGE TO INCREASE A SENTENCE BY FINDING FACTS THAT DIRECTLY CONTRAVENE THE JURY'S VERDICT.

The State asserts as fact that "Petitioner then grabbed a pair of scissors which had been lying on the bed." Br. Opp. at 2. The prosecutor had argued that Haskell had used them to threaten the victim. But the jury found Haskell not guilty of using a weapon. (Tr. V, 19). As explained in the petition for a writ of certiorari, the jury surely did this because no scissors were ever found; neither the victim's mother nor the officer who photographed the room ever saw any scissors; and the victim told conflicting stories about what happened to the scissors. Petition for a Writ of Certiorari, at 16-17.

Notwithstanding this express finding by the jury, the trial judge said that the jury's "verdict was an opinion" (App. at 26) and imposed a greater sentence on the grounds that "the offender possessed" a "cutting or stabbing weapon." MCL 777.32. In other words, Haskell's sentence was increased because the judge found a fact that directly contravened the jury's verdict.

Haskell objected in the Michigan state courts that this violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 961 (2004). The State is

wrong in saying that Haskell waived this objection. Br. Opp. at 18. This was expressly presented in the Michigan courts. *See* Defendant-Appellant's Brief on Appeal at xxv-xxvi. The Michigan Court of Appeals rejected Haskell's argument not by saying that it was waived, but rather by concluding that "*Blakely* does not apply to Michigan's sentencing guideline system." App. at 15. The State repeats the Michigan Court of Appeal's argument, contending that since Michigan law sets both the minimum and maximum sentences, *Apprendi* and *Blakely* do not apply. Br. Opp. at 19-20. But *Blakely* holds that any fact, other than a prior conviction, that leads to a sentence greater than that which could be based on the jury's verdict or the defendant's admission, must be proven to a jury beyond a reasonable doubt. 542 U.S. at 303-04.

The State, of course, is correct that *Blakely* involved a sentencing guideline system, whereas this case involves an indeterminate sentencing system. But the important question, not yet considered by this Court, is how *Blakely* should be applied to this type of sentencing system. Michigan law sets the minimum sentence for an offense and the statute also provides a series of factors that warrant enhancements. *See* Br. Opp. at 12-13. The issue which has not yet been decided by this Court is whether a judge, in a sentencing system like Michigan's, may increase a sentence based on facts contrary to the jury's verdict. May a judge find that statutory enhancements are present when the jury came to an opposite conclusion?

Contrary to the State's assertion, the Michigan sentencing system is nothing like *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where this Court held that jury's do not need to find the facts that lead to mandatory minimum sentences. In *United States v. Harris*, 536 U.S. 545 (1982), this Court reaffirmed *McMillan* and held that *Apprendi* does not apply to mandatory minimum sentencing systems. But Michigan does not impose mandatory minimum sentences. Rather, Michigan law sets a minimum and a maximum, with judges increasing sentences above the

minimum by finding statutory enhancements to be present. The issue presented by this case is whether a statutory enhancement that leads to a greater sentence than the minimum may be found by the judge by a preponderance of the evidence, or whether it must be proven to a jury beyond a reasonable doubt.

It is this question that divides the lower courts. The petition for a writ of certiorari identifies a number of lower courts that have differed over the issue of whether the judge may find factors that increase sentences above the jury's verdict. Pet. Writ Cert. at 19. The State's response is that none of these sentencing systems are like Michigan's. Br. Opp. at 21-23. But this misses the point. Whether the system is determinate or indeterminate, the issue arises as to whether a judge can impose a sentence greater than could be based on the jury's verdict by finding facts that are contrary to the jury's conclusions.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A CONFLICT AMONG THE LOWER COURTS AS TO WHEN THERE MUST BE A HEARING TO DETERMINE IF THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL.

This is a case where there is very substantial evidence of ineffective assistance of counsel. As explained in the petition for a writ of certiorari, as of the evening before the trial, the defense counsel had done no preparation on an insanity defense based on the defendant's suffering Complex Partial Seizure disorder, even though it was clear that this was to be the primary defense especially as to the battery claim. The trial counsel had not spoken to Haskell's treating physician or arranged any expert witnesses. Pet. Writ Cert. at 21. Also, the trial attorney failed to file the requisite notice so that the alleged victim's prior sexual relationship with Haskell could be raised. *Id.* at 23. As a result, as the Michigan Court of Appeals acknowledged, this could not be presented to the jury and Haskell

never could present a crucial aspect of his defense: that the victim accused him of rape to hide her sexual relationship from her parents. App. at 12-13. When Haskell discharged his lawyer, the attorney retaliated by lying to the judge about having received threats from Haskell. Pet. Writ Cert. at 22. This caused the judge to incarcerate Haskell, which directly prevented him from receiving the physical tests his lawyers needed to establish his defense. *Id.* at 22.

The issue is whether a hearing on ineffective assistance of counsel was required under these circumstances. Again, contrary to the State's assertion, Haskell did not waive this. He filed a "Motion to Remand for a *Ginther* Hearing to Develop a Testimonial Record on Ineffective Assistance of Counsel." *See People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (1973) (providing a hearing on the issue of ineffective assistance of counsel). The State asserts that this was not preserved in the Michigan Supreme Court. Br. Opp. at 25. Quite the contrary, the petition for review in the Michigan Supreme Court stated:–

> X. Haskell was denied his Sixth Amendment right to the effective assistance of counsel, and there is a reasonable possibility that, absent this, the outcome of the trial would have been different.

Defendant-Appellant's Corrected Application for Leave to Appeal, at 49.

There is a major, unresolved issue of when courts must grant a hearing on the issue of ineffective assistance of counsel. Lower courts are clearly divided on this issue. *Compare, e.g., United States v. Graham*, 2006 WL 1196250 (10th Cir. 2006); *Gomez-Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005); *United States v. Davis*, 159 Fed.Appx. 814 (9th Cir. 2005) (requiring an evidentiary hearing on ineffective assistance of counsel), *with United States v. Walters*, 163 Fed.Appx. 164 (10th Cir. 2006); *Goldsby v. United States*, 152 Fed.Appx. 431 (6th Cir. 2005) (no evidentiary hearing warranted on whether there was

ineffective assistance of counsel). This case presents the Court an important opportunity to resolve an issue that constantly arises across the country as to when a factual hearing is necessary on a constitutional claim of ineffective assistance of counsel.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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